



MONTGOMERY COUNTY PLANNING DEPARTMENT

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

February 27, 2013

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Khalid Afzal, Planner Supervisor, East County Team *KA*
Area 2 Planning Division

Glenn Kreger, Chief *GK*
Area 2 Planning Division

FROM: Renee Kamen, AICP, Senior Planner
Area 2 Planning Division *RK*

SUBJECT: Board of Appeals Petition No. S-2864, Supplemental Staff Memorandum

This supplemental memorandum is staff's response to additional documents (attached) provided to the Montgomery County Planning Board on February 22, 2013 (after the publication of the staff report on February 15), and will be added as Attachment 24 A – C to the staff report dated February 14, 2013. This additional information raises questions about the Applicant's need analysis and the applicability and intent of the ZTA 12-07, Special Exception-Automobile Filling Station, approved by the County Council on July 24, 2013 (Ordinance No.: 17-19). The following are key issues raised in the additional information with staff responses to each issue (in italics).

Need Analysis:

- 1) The neighborhood for the need analysis should be no more than a 7-minute drive time.

Staff believes that a 10-minute drive time is appropriate in this case given the members-only nature of the proposed gas station and the fact that the current Costco gas station in Beltsville is about 20 minutes away.

- 2) The Applicant's report "lacks many of the most crucial numbers to adequately analyze the issues... much of its discussion should be stricken as inadequately documented and incapable of being properly reviewed;" (pg. 25)

Staff has analyzed the Applicant's data in great detail and accepted it for the purposes of conducting a need analysis.

- 3) “The proposed station provides no amenities to the neighborhood beyond an additional gasoline supply;” (pg. 25)

Staff believes that the lack of amenities has no bearing on the need analysis for the proposed gas station. Costco gas stations typically don’t have additional amenities such as a convenience store or a car wash and they can still meet a need for the Costco members who want to purchase gas.

- 4) This gas station serves a “small portion of the community while pulling in traffic from all over the region. And, by virtue of the overutilization of its capacity, it will have significant lines of queuing cars through much of its operations, lines that cannot exist at the existing stations, due to their constricted footprints and the bar on spilling traffic out onto the highway;” (pg. 25)

Traffic impacts are addressed separately in the staff report. Even though the proposed gas station may draw traffic from a larger area, the proposed need analysis is based on a neighborhood within a 10-minute drive time from the proposed location.

- 5) “As a result, all of the burden from that congestion and concentrated effects of a station (magnified by the huge size of this station) that draws from all over the county and the District of Columbia will be imposed on a community that will derive little benefit therefrom;” (pg. 25)

Impacts of the proposed gas station are addressed separately in the staff report.

- 6) “There is unlikely to be a significant pricing advantage for the community (to the extent they can use the station) and, in any event, minimal pricing differences cannot overcome the standard to show need;” (pg. 25)

The need analysis is based primarily on the Costco members’ preference to buy gas at the Costco station regardless of the difference between Costco prices and other gas stations, which may vary depending upon the market (see Section X of staff report).

- 7) “There is no showing of “need” based on the Nielson calculations. The report unreasonably suggests that need is shown anytime less than 100% of the potential demand is provided in the area. The existing supply is more than adequate to meet a reasonable portion of the potential demand;”

Staff has accepted the gap analysis based on Nielson data only as supporting information to understand the overall market supply and demand in the area, not as the main justification for need for the proposed gas station.

- 8) “Any supply gap that exists is for a different kind of station than that proposed here. Conversely, by building a station that draws in regional business, Costco will preempt and usurp the ability of the community to have stations that serve those in the community;”

See response to #7 above.

- 9) Demand will decline until at least 2040 as gas efficiency improves and that the Wheaton area is more likely to become more transit-oriented.

Staff believes a potential decrease in demand (even if likely, although questionable) does not necessarily negate the need for a members-only Costco gas station.

Intent of the ZTA 12-07, Special Exception-Automobile Filling Station:

The Stop Costco Gas Coalition submitted a synopsis of ZTA 12-07, which required a minimum setback from certain sensitive land uses for a gas station dispensing more than 3.6 million gallons per year. The Coalition members assert that:

- 1) the gas station size matters, and therefore the staff should give greater scrutiny to these larger gas stations and “not judge them by the same standards that were applied to the 26 smaller gas stations in the neighborhood over the years...;”
- 2) the distance from sensitive land use matters, and that if the proposed gas station is three times the typical gas station, the “planning agencies could triple the buffer to 900 feet, as a matter of good science and common sense, especially when the affected population was many times as sensitive as the general population;” and
- 3) “During the course of this struggle the EPA issued new rules for ultra fine particulates that were not in effect when Costco’s experts performed their calculation... Given the trends as well as uncertainties, we believe the Planning Commission should come out against this proposal in the strongest terms possible.”

Staff Response: *This case has been scrutinized by staff in more detail than any gas station case in recent history. Staff requested, and the Applicant provided information that has not been requested in previous cases. Staff has carefully analyzed all aspects of the proposed gas station and based its recommendation on the information of record and the latest scientific information available to address all relevant findings required by the Zoning Ordinance for review of gas station special exceptions.*

RMK:ka:ha: N:_AREA 2 Division\Kamen\S-2863 (Costco)\Attachment 24.docx

ATTACHMENTS:

- 24B: Demonstration of Need by Karen Cordry, 10705 Torrance Drive, Silver Spring, MD
24C: The New ZTA and Costco’s Latest Application for a Special Exception, by Larry J. Silverman 7308 Birch Avenue, Takoma Park, MD

ATTACHMENT 24B

There Is No Demonstrated “Need” for the Proposed Costco Gas Station¹

Introduction

An absolute prerequisite for granting a Special Exception request for a gas station within Montgomery County is that there is a “need” for such a station “to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.” Two standards have been used to resolve that issue. The station cannot be justified under either.

A. Need as “necessity”

The most normal dictionary reading of this provision would require some showing of *unavailability* of gas station services to the community surrounding the Westfield Wheaton mall in light of the existing capacity to provide such services. The applicant cannot possibly satisfy such a requirement in that there are 25 other stations selling the identical products – regular and premium gasoline – within a 7 minute driving radius. The capacity of those twenty-five stations, even using a conservative estimate of their pumping capacity, is several multiples of any possible existing demand in the neighborhood. Moreover, even assuming the concept of a “Costco gas station” was a unique need that must be assessed separately, there are already such stations available “to the neighborhood.” Thus, there clearly is no need for *this* station.

B. Need as “usefulness.”

Case law has also indicated that a broader, more amorphous standard might be applicable, i.e., whether the proposed use would be “expedient, reasonably convenient and useful to the public.” Whether or not that remains the standard (see the attached opinion letter from counsel Michele Rosenfeld (Exhibit 1), demonstrating that it is *not*), the station cannot satisfy even that broader definition.² That is true for several reasons:

- It will serve only about 25% of the population; the remaining 75% will receive no benefit or usefulness from the station.
- To the extent that it removes significant amount of sales from existing stations, the loss of such stations will result in a loss to the entire neighborhood of gasoline availability and amenities not provided by the Costco station. That loss will affect not only the 75% of non-members, but also the 25% of Costco members for any

¹ Report prepared by Karen Cordry, 10705 Torrance Drive, Silver Spring, MD 20902.

² Moreover, as demonstrated in the attached supplemental legal analysis (Exhibit 1-A), a close reading of the *Lucky Stores* case that uses that terminology clearly shows that it was willing to uphold the denial of a special exception request where the evidence indicated a substantial degree of existing capacity that could satisfy any likely demand from the community. Read in its proper context, the “usefulness” standard was not meant to do away with a careful examination of the existing service capacity in the neighborhood.

of the times the station is closed or when they wish to use those amenities themselves at any time of day.

While in most cases, a new competitor may provide better services and amenities to all when it replaces an outdated existing venture, since the Costco station will not be available to 75% of the local area, those that are not members will simply lose options now available to them. Further, even if they pay to join Costco, and buy its gasoline, it will supply nothing to replace amenities that will be lost from the failure of existing stations, thus disadvantaging 100% of the neighborhood.

- The vast majority of Costco's "need" calculation relates to a form of service – gas stations *with* convenience stores – that Costco does not propose to build. To the contrary, it aggressively asserts that it will provide *no* services (not even a squeegee to clean one's windshield) beyond the gas that it will pump.
- Even under Costco's "need" calculation, there is a demonstrated "need" for only about 2 million gallons of services from stations without convenience stores, far less than the 12 million gallons Costco proposes to pump. Thus, there is no need in this neighborhood for a mega station such as is proposed here.
- Costco will not primarily supply the "needs" of this neighborhood; rather, it concedes that its service area will extend far beyond the neighborhood at issue here. Thus, only a small portion of the 12 million gallons will actually supply the purported need "gap" in this neighborhood.

However, because *all* of its sales will be counted in any future calculation of "need" in this area, those regional sales will create the appearance that there is no longer a "need" gap in this area. As a result, if this neighborhood *does* need more gas station services of some form (i.e., gas stations with the convenience stores) those applicants will be handicapped in applying because their showing of *neighborhood* need will have been preempted by Costco's regional sales.

- Authoritative federal governmental projections indicate there will be a continuing decline in gasoline usage from now through at least 2040. If there is no need now, there will be even less every year from now on. That is even more true here, in close proximity to the Metro, and where the population is increasingly attuned to use of public transit – as the County wishes and strongly encourages.
- Finally, any claim that Costco's low price strategy provides a large benefit to its members and/or any incidental benefit to other areas by placing downward pressure on surrounding prices is largely without merit. A careful analysis indicates that the purported savings are far smaller than asserted by Costco and there is ample reason to believe that Costco prices to the surrounding market, rather than establishing any separate, automatically lower "Costco" price.

DISCUSSION

A. Special Exceptions in General

Special Exceptions are required for certain activities within the County, either within certain zones or for all zones. The Zoning Code states:

59-C-1.31. Land uses.

“No use is allowed except as indicated in the following table”

In that table, gas stations are shown in category “e” as not permitted in residential zones and as a Special Exception in all commercial zones.

Special Exceptions are required for activities that, by their nature, impose greater burdens on the surrounding neighborhood than other proposed uses. As a result, stricter scrutiny is required before the community can be forced to accept that burden. Certain uses, such as restaurants and hotels, conference centers, and the like, must show a “county need” for the service. Other exceptions (all related to auto services and swimming pools) must meet an even more stringent standard, i.e., they will be allowed only if they meet a *neighborhood* need standard in addition to all of the other requirements imposed under that section.

59-G-1.24. “Neighborhood need.”

In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

- (1) Automobile filling station.

The difference in the need standards is likely related to two factors: county needs are those for which large facilities serving a wide audience base are typical and only a relatively small number are built. Neighborhood facilities, on the other hand, are generally small-scale operations, fairly uniform in design and size, that typically serve – and burden – only a limited area.

In evaluating a Special Exception, the general standard is set out in 59-G-1.2.1.

A special exception must not be granted without the findings required by this Article. In making these findings, 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. Inherent adverse effects are the physical and

operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. 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. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

Under that section, the reviewer cannot rely solely on “inherent adverse effects” that are standard to the particular special exception use to deny approval. Those opposing a special exception must, rather, show that there are some “non-inherent adverse effects,” that alone, or in combination with the inherent effects, provide a sufficient basis for denying the exception. Thus, the very reasons that are why a Special Exception requirement has been imposed – the *inherent* adverse effects – cannot be used as a sole basis for denying the application for that exception.

It may, at first, seem illogical for opponents to be precluded from relying on the actual problems the use creates to support their position. However, we believe the overall structure of the Special Exception standard logically reconciles all of the provisions. Special Exceptions apply to operations that may range from a “necessary evil” (such as a filling station) to a welcome (but somewhat burdensome) use such as a community swimming pool with its traffic, noise, and the like. The Zoning Code balances these concerns by requiring that there be a showing of “need” for the activity, which, in turn, serves as the *justification* for imposing those burdens on the community. Filling stations fall in that category and, accordingly, there must be a showing that the *local neighborhood* needs and will benefit from the use *because* they are also the only ones being burdened thereby.

Under this analysis, “need” is a critical factor to balancing a developer’s desire to use a property for a particular purpose and the burdens that such use will impose on the surrounding community. Demonstrating a county need for a use subject to a neighborhood need requirement is irrelevant. The needs of the region cannot be used to foist the entire burdens of such a project on a single neighborhood. *The County has concluded, as a matter of law, that gas stations are not such unique operations that an applicant can argue that its operation can bypass the neighborhood need showing and demand to be judged on its value to the county as a whole.*

B. The Existing “Neighborhood” and the Current Status of Gasoline Station Service

1. The Neighborhood

For purposes of the Special Exception, the applicant has proposed, and we accept, the “neighborhood” as being the area within roughly a 7-minute driving radius of the proposed station. That translates into an area running north to Glenmont, east to Four Corners, south to the Beltway, and west to Kensington. According to the applicant’s report (Ex. Q, p. 4-3), this area is estimated to have a 2012 population of 104,500, with a household size of 2.87, or 37,382 households.

This area is part of the densely populated and highly developed “down county” area of Montgomery County, that has long since been built up and where only relatively small areas of undeveloped land are left for further development. Added, denser development often must take place by removal of existing projects (such as replacing the existing Safeway on Georgia Avenue with a massive high-rise project in the same space. As part of that developmental process, the 25 gas stations now in existence in the study area were built decades ago. The most recent station in the study area was the Freestate at 11295 Viers Mill Road, built in 1991. It appears that the last special exception for a station in the down county area was granted in 1999. Despite this strong evidence that the market is and has been saturated, this new proposal would be the same as building, in one fell swoop, the equivalent of 4 to 8 additional stations together in one location.³

2. Currently Available Service

The applicant originally stated in its 2010 “needs” report that there were 27 gas stations within the study area. The report noted that there were four stations at Four Corners, but only counted one of them (the Shell station on University) without explaining the omission. It has been suggested by Planning staff that two stations were not counted because they are on the north side of University Boulevard, which serves as a boundary line for the study area. That still excludes, though, one station (the BP at 112 University Boulevard) that is on the south side of University *and* is closer to the mall than the Shell station that was included. That makes the total 28 stations. Since that time, though, *three* stations in the Glenmont area have closed (the 2012 report notes only 2 closures). Accordingly 25 stations are now present in the study area (although a slightly different 25). Of those six are within the Wheaton Central Business District. See Exhibit 2 – a spreadsheet chart compiled from the listings in the 2012 needs report (p. 3-2).

Those 25 stations have a total of 217 available pumping nozzles. We have calculated a reasonable annual pumping capacity per nozzle (based on the assumptions set out on the attached chart) as being approximately 1.03 million gallons (this is somewhat conservative in that it uses only an 18-hour day on average, although the bulk of stations are open 24 hours a day, according to Costco, see Ex. O, p. 12); multiplied by the 217 nozzles, this translates into an available pumping capacity for the “neighborhood” of *at least 225 million* gallons per year.⁴ We are in the process of gathering actual pumping data for as many of the stations as possible. As of now, we have been informed generally that, for seven stations with a total capacity of more than 65

³ According to the testimony of Joseph Cronyn, a “needs” expert who testified in S-2743 (p. 32), a typical station pumps approximately 1.5 million gallons of gas, so the 12 million gallons proposed by Costco would be 8 times as much. It is our understanding that the Freestate pumps about twice that much, making this station the equivalent of 4 such stations. Mr. Cronyn has been hired to testify for Costco with respect to other aspects of its application.

⁴ It was also assumed that only 13.17 cars per hour would be served (derived from actual numbers at Elkridge (Ex. P, p. 22) (and see Exhibit 2A). If, the number of cars is increased to 14.25, the highest number recorded at Elkridge based on the data in Exhibit 2A, the pumping capacity rises to 241 million gallons. The 12 gallons per fill-up volume is an educated guess. The report did not provide any information on this; we have asked Planning Staff to try to obtain the number from Costco, but no data has been provided to date. If the volume is higher per fill-up, that would make the 225 million gallon capacity number even higher.

million gallons, the reported sales volume is only 13.1 million gallons or only 20% of the maximum possible. We expect the numbers to be consistent when additional data is obtained and are working to be able to provide the actual station information.

3. Available Service Capacity is Far in Excess of Existing Need and/or Neighborhood Purchases

The need report does not contain *any* calculation of the actual amount of “neighborhood need” for gasoline services, either for residents, businesses, or passersby, although that is obviously an indispensable part of any discussion of this issue. We have asked that the applicant be required to submit such data. In its absence, we can only extrapolate a possible answer from certain disconnected numbers in the report. At one point, the report states (Ex. Q, p. 4-3) that there are 37,382 households in the study area; at another point (Ex. Q, p. 3-6), it asserts that a typical household uses 1,012 gallons per year. If so, that would indicate about 37.8 million gallons of total area need for gasoline purchase to be made.⁵ Thus, the 225 million gallons of pumping capacity is almost six times that current usage.

Even if one adds another 50% to account for the relatively small number of local businesses and for passing traffic, bringing one to 57 million gallons,⁶ existing need for gasoline is still only a quarter of existing capacity. If existing area sales are less than 100% of the existing purchases of the neighborhood households as Costco asserts, then the ratio of available pumping capacity to actual sales is even higher. In any event, one can certainly estimate that existing stations are only operating at about 17 to 25% of available capacity on average – *as a maximum*. The actual totals may be even lower.

The absence of any need for additional capacity is amply demonstrated by the absence of any lines of waiting cars at existing stations now and the applicant certainly makes no attempt to assert that there is any delay in cars accessing pumps anywhere in the study area. Even closing three stations in Glenmont has had no effect in creating lines at any other stations in the area. Thus, under any normal dictionary definition of the term “need” as meaning a “necessity” to add capacity, there is clearly no evidence that the area “needs” any more stations. Indeed, the very low levels of current utilization suggest that many stations may be operating on very low margins and could be highly vulnerable to any further losses of business to new entrants.

In our view, as noted, above, “need” is a critical factor in reviewing the nature and extent of the adverse effects. We believe that there is, in a sense, a sliding scale – the less overt and extreme the adverse effects from a new station, the less one may need to prove that there are meaningful benefits to the neighborhood that will be faced with those burdens. *Conversely, the more severe the effects are upon the neighborhood, the more important it is to apply a critical*

⁵ We do not concede the validity of the gasoline usage number. It appears in the report with no derivation whatever and we reserve the right to challenge how it was arrived at. However, for purposes of argument, the truth is presumably is no higher than the number cited, so one can use that in discussing the maximum current need and purchases.

⁶ Again, this is purely guesswork on our part. The applicant has supplied no information in this report on what that existing number of overall sales is in this area.

eye to claims of “need.” If one really needed a particular service, one may have no choice but to put up with its drawbacks, but if the service is *not* needed, then the neighborhood should be required to put up with very little from an applicant that demands entry for its own benefit.

That said, we understand, that a somewhat broader definition of “need” has been discussed and we next review the applicant’s effort to meet that broader standard. As we show below, the report omits numerous data necessary to properly analyze those issues and its assertions do not prove its case. Thus, it has failed to demonstrate that it can make the requisite showing of “need” under even this looser standard.

C. The Proposed Costco Gas Station

Costco proposes to build a 16-pumping nozzle station with a practical maximum capacity of about 13.6 to 14.5 million gallons (based on calculations similar to those used for the other stations as set out in Exhibit 2).⁷ The 12 million gallons it projects to sell is about 82.75-88.5% of that capacity – indicating that, unlike other area stations that can easily accommodate their customer load because they are operating well below their maximum sales, this station has no leeway to accommodate customers that do not arrive precisely equally spaced across all of its operating hours. This is, not surprisingly, why Costco stations routinely have long lines of idling cars during much of the day as the arriving customers outstrip the station’s ability to serve them.⁸

Costco’s business model utilizes a small number of stores that act as magnet destinations for customers across a wide geographic area. Doing so allows it to use a minimum amount of facilities and personnel to sell the maximum amount of product, which undoubtedly contributes to its profitability and allows it to charge the low prices for which it is famous. According to its website, Costco has only 450 warehouses to serve 40 states and, now, the District of Columbia. According to the National Association of Convenience Stores (www.nacsonline.com/gasprices, p.18), it has even fewer gas stations - only 321 nationwide. By contrast, Walmart, for instance, another famously low-price store, had more than three times as many stations and nine times as many stores (1,066 stations and 4,000 stores), according to its website. In addition, it operates 620 Sam’s Club warehouse stores with 462 gas stations.

⁷ We have used a smaller capacity per pump (848,000 to 9036,300) based on the substantially shorter operating hours for the Costco station (103.5 hours per week versus at least 126 or more for the other stations). The calculation is otherwise identical and is shown on Ex. 2.

⁸ The queueing report (Exhibit 3) for the Elkridge station on March 31, 2012 (provided as part of the prior application) is a good illustration. Starting with no cars in line at 10 am, the line is up to 10 cars eight minutes later, quickly swells to the mid to upper teens, hits 20 cars by 10:38 and continues to grow, peaking at 41 cars waiting. The queue consistently held between 20 and 35 cars for virtually the entire period between 10 am and 4 pm. In short, lines are not an isolated incident for these stations; they are standard operating procedure. See also attached aerial shots (Exhibit 4A-D) for other Costco stations showing the same result on a single day in 2008 where all happened to be captured at the same time. (Sterling did not have a shot on the same day, so it’s most recent aerial photo is used, Exhibit 4E).

Montgomery County currently has only *one* Costco store (in Gaithersburg) and there are only nine in the entire state of Maryland. Walmart, by contrast has 12 stores in the Baltimore-Washington corridor alone. Plainly, this means that customers may need to go much further to shop at Costco than they would to purchase gasoline at another operation. Having already decided to go that far to shop at the store, it may make sense for them to wait to purchase their gas on the same trip, based on the perception that Costco typically has lower prices. (Some memberships also give a rebate on gasoline purchases as well which may be another reason for members to choose to preferentially buy from Costco.)

In serving that market, Costco has, as noted, used a station sizing model that is barely adequate to satisfy the demand that it creates within its regional membership pool. If the station had a capacity usage of even 50% (compared to the 17 to 25% for typical stations described above), it would have to use on the order of 28 to 30 pumps or more to accommodate that need without creating significant back-ups. A station of that size, though, would underscore just how large this proposed operation is compared to other operations in the area; the use of only 16 pumps coupled with the very high capacity utilization serves to artificially minimize the station's impact while creating a station with effects very different from the norm.

Put another way, this operating mode is *not* inherent in the operation of gas stations. No other station in this area (or we believe in the county) utilizes extensive queuing and idling as a routine part of its operation. While any station may have an occasional momentary delay in bringing cars to the pump,⁹ the Costco model is wholly outside of the norm. That idling is at the heart of many of the concerns raised by the neighboring community as to both health issues, as well as violations of the letter and spirit of the Maryland anti-idling law, which is discussed in a separate filing. The demand, though, that is generating the idling does not primarily come from this community because the vast majority of the community cannot use this station at all. Instead, it is a regional need generated by Costco and brought to this single location to the detriment of the local community.¹⁰

As to the specifics of its proposed operations, Costco has made crystal clear that its station will offer *nothing* but gasoline – and indeed, only two grades of gasoline (regular and premium). It will not offer mid-grade gasoline nor diesel. It will have *no* form of convenience store or sell any product other than gasoline. It will not operate any service bays or even have an air pump for those with a tire that is low on air. It will not offer restrooms for its patrons (or for anyone else in the vicinity). Indeed, it will not even offer a squeegee for patrons to clean their windshield lest that slow the process of moving gas buyers through in the most efficient way.

⁹ Stand-alone stations do not have the large parking lots that Costco uses for idling cars and, since they need to generate their own business, must perforce locate on main roads so they are visible. By law, though, they cannot have cars back up onto the public roads and their sites are generally not large enough to hold more than a few cars waiting to fill up, not the 40 or more that Costco aims to accommodate as a routine matter.

¹⁰ It is our understanding that, in connection with the enactment of ZTA 12-07, Costco solicited expressions of support from its members as far north as Boyds, MD and well into the District of Columbia to the south as persons expected to use the station. Costco's filings make clear that it serves a regional market and expects customers from far outside the study area.

(See page 4, 11 of Exhibit O). In short, Costco will offer *nothing* not already supplied by the 25 other competing stations in the area. Instead, it will offer less than *every* one of those stations either in terms of hours of operations, breadth of gasoline product offering, or availability of other products or services for those who have need thereof.

Unlike every other gasoline stations currently serving the county, this station will be “membership only.” The difference – and one that creates effects that are not inherent in the operation of a standard gas station – is that any benefits created by the station accrue only to those who join and pay the membership fee; the inherent adverse effects of the station (and others that are unique to this station) are imposed on the entire surrounding neighborhood that receives no benefit therefrom.¹¹ Costco concedes that only some 23% of current neighborhood residents are members. (Ex. Q, p. ES-1). Thus, this leaves 77% of the area residents suffering any burdens created by the station but receiving no benefits therefrom.

If neighborhood stations lose significant business and are forced to close, the area will be harmed in ways that cannot be compensated for by the existence of the new station. Ordinarily, one might say that a loss of station X to competition from station Y does not harm a community since one can simply shift one’s business to station Y, which is likely to be an improvement over station X. In this scenario, though, any station that closes will represent a net loss of amenities to *everyone including Costco members*. Whether it is the lack of open stations after 7 pm on Saturday or Sunday, for instance, or the absence of service facilities, or the lack of access to convenience store products, restroom facilities, or even windshield washing supplies, it is clear that everyone will be the loser with respect to any stations that are lost. These unique features of the Costco proposal indicate why arguments about more traditional stations do not readily translate here.

Costco nevertheless argues that it can demonstrate a “need” for the station under the broader standard detailed above. It has provided a lengthy expert report that purports to prove that “need” exists. As we will show below, the report fails to satisfy that goal.

¹¹ The only possible benefit the neighborhood may receive is if there is pressure on surrounding prices from the existence of the Costco station. At some points in its discussion, Costco suggests that it has this generalized effect (Ex. Q, p. 3-6); but it also concedes that pricing is very much a localized phenomenon (Ex. Q, pp. 3-5,, 3-6). We will discuss the pricing point below; suffice it to say there is little evidence that the Costco store will have any significant effect or that any such effect will outweigh the problems that its presence can create for those who are not members.

D. Costco's "Need" Report¹²

This discussion will address the various points made by the report prepared by Thomas Points Associates in the order presented but will discuss the issues more generally as appropriate.

1. Area Population

a. Demographics (sections 2.1 - 2.3)

This section provides a demographic discussion of the study area. Nothing therein indicates how the numbers presented correlate with a determination of actual demand. The report suggests there will be an 11% increase in population in the Kensington/Wheaton Policy Area between 2010 and 2040 (a portion of which has, of course, already occurred). That growth rate is less than half, though, of what is projected for the county as a whole (see Ex.2-3). The report also references the Sector Plan's endorsement of efforts to bring more development to Wheaton; efforts that presumably are already reflected in the growth projections.

The one point of note is that the median age in the study area dropped from 40 to 38.6 between the 2010 and 2012 "need" reports prepared by Thomas Point (see Ex. Q, p. 2-3, and the same page 2-3 in the analogous 2010 report). This is a rather dramatic decrease in only a short period of time and presumably relates to the large number of new townhouses and apartments coming on line and appealing to younger residents. As indicated in the discussion of the Smart Growth and Transit-Oriented Development issues separately provided to Planning staff by Donna Savage, younger residents are far more likely to use public transit, to have fewer cars, and to drive less than others (see articles cited there). Thus, this drop in median age is likely to correlate with lower gas usage despite the increase of population.

b. Travel to Work (section 2-4)

This section asserts that study area residents have longer drive times than most Americans but make no effort to correlate those drive times to gasoline usage. Since long commutes can be based on congestion as easily as mileage, the time needed to drive to work has little predictive relevance to consumption.

The report also asserts that most residents still drive alone, but concedes that one in four residents of Wheaton (five times the national average) take public transit. In fact, the Wheaton Sector Plan (p. 71) asserts that almost 52% of residents use public transit to *leave* Wheaton to go to work (noting that a smaller percentage uses transit to arrive at Wheaton) and that number is three times the County average.¹³ In any event, whether the number is 25% or 52%, it is clear

¹² The current report is actually the third iteration of much the same sort of information. That said, a number of numbers reported therein have changed rather markedly from one report to another such as the Population Forecasts from the 2010 to 2011 to 2012 reports. This discussion will, in general, stick with the most recent report numbers although it will occasionally note the evolution in the reports if relevant.

¹³ The application includes excerpts from the Sector Plan as Exhibit M. The highly

that the neighborhood study area here is at the forefront of the Smart Growth/Transit-Oriented Development mode of growth that the County is strongly pushing for future development. A primary goal of those modes is to reduce the use of cars and the consumption of gasoline.

c. Worker population (section 2-5)

This projects an increase of 22.4 percent over a thirty year period from 2010 to 2040, i.e., less than three quarters percent a year. Again, three years of that growth has already occurred. There is no correlation provided here between job growth and gasoline usage.

d. Traffic (section 2-6)

The report gives traffic counts at several locations for 2009, 2010, and 2011. The numbers show no consistent pattern. Some increased by relatively small amounts, some swung back and forth, and at least one location (Georgia north of the Beltway) dropped significantly. Other than saying that this is a heavily traffic area, the report provides no information about the amount of gasoline usage in this area.¹⁴

e. Conclusions (section 2-7)

This merely summarizes the information above. Nothing in it connects the information presented to gas usage.

2. Supply

a. The Competitive Environment (Section 3.2.1)

This discusses the various other stations noted above. It refers to 25 stations; as noted, this leaves out one station that should be included in the Four Corners area, but another station has closed in Glenmont, thus leaving the same number of stations. It describes the stations and their putative customers, which, in each case, are essentially the persons living in the areas near them or driving by. (Inasmuch as typical gas stations are intended, under the Special Exception model, to serve a neighborhood need, this localized customer base is to be expected.)

It also contains a chart that lists the various stations and whether they have service bays and “marts” (presumably convenience operations). Although most are listed as having

selective choice of pages to include does not, for instance, include these pages and the Needs Report uses numbers that appear to be markedly different from the County’s numbers. We do not have sufficient information to know which is correct, but in either case, it is clear that this area is much further along the path to public transit than the nation (or the county) as a whole.

¹⁴ There is a reference to road improvements at Georgia and Randolph and a statement that the impact of the change on the need for gasoline usage will be discussed in Section 3.2.1. In fact, other than discussing the change and the fact that two stations have closed due to the change, the report provides no information there about the effect of the change on gasoline usage.

some form of mart, our observation is that most have a very small area as an adjunct to the cashier area with limited items compared to the more robust convenience operations at a Royal Farms or WaWa or the like. (No such operations are currently located in Montgomery County.) Nine are listed with a reference that suggests a larger, more expansive convenience store operation. 17 stations have either 2 or 3 service bays.

We do not believe there is anywhere else in the county that has a greater concentration of stations based on an informal review of mapping software used at a similar scale to that of the drive time used in the study area. We would welcome any more formalized information that could be provided by Park and Planning or the applicant that would indicate if any similar or more concentrated number of stations (and pumping nozzles) exists elsewhere.

b. Price Competition (Section 3.2.2)

This is one aspect of Costco's attempt to demonstrate that its station has some unique value to the community, namely that it assertedly will charge less than other stations in the area. As we show, though, the reality is far less impressive than the report suggests.

- Gaining business by reduced prices does not demonstrate "need."

Initially, of course, it is difficult to say that reduced price has anything to do with "need" in any way that relates to "supply" as this section in the report is entitled. It is certainly true that, if one charges less for a fungible product, one can usually generate increased demand. That is not at all the same thing as saying there is an inadequate *supply* of that product. Indeed, if all one needed to do to show "need" was to promise to charge less, one might as well substitute a bidding war for the Special Exception process. On that basis, the Giant/Shell gasoline discount program provides a far more significant reduction in price than anything that Costco offers. A typical family can easily generate a 10 to 20 cent a gallon discount (and potentially far higher amounts) on a weekly basis simply by making normal grocery purchases and with no need to buy a membership, wait in long gas lines, or limit themselves to a single purchase location.

- Second, any such comparison is inherently biased when one station is operating as an adjunct to a huge retail chain that can use the station to help generate business for the store without worrying about whether the station is independently profitable. In that regard, the September 2011 needs report, stated in "Costco Gasoline Business" (section 1-3, p.2), that

The gas station is an important part of the Costco Warehouse operation. It is important to Costco since the presence of a gas station has been found to increase total warehouse sales by approximately 20%.

This forthright admission as to why Costco is pressing so hard for this station has disappeared from the current report, but we doubt that the facts have changed. There is no way to tell from these reports whether Costco's gas pricing is based on the normal profit and loss factors that every other station has to confront, or whether it has the pricing leeway to simply

choose to set its price just below that charged in the surrounding area. (For instance, there is no indication in the report as to whether gas stations are accounted for as a separate profit and loss center or whether it is enough that they do their job by helping to pull more customers to the store.) If, as seems likely, that price leeway does exist, then Costco can garner business from its most price-conscious members (who are willing to trade lower price for a lengthy wait in line) regardless of the amount of alternative supply already in the neighborhood (and regardless of whether the neighborhood as a whole can benefit from the prices Costco sets for its own members). We have asked Planning staff to obtain pricing and profit information from Costco in order to explore these issues. Absent that information, it is impossible to tell if these prices are fairly set.

However, what can be seen (based on a pricing chart we have generated (Exhibit 5)),¹⁵ is that on any given day, there is anywhere from 10 to 31cents difference or more *between* Costcos in this state or Virginia – an amount that dwarfs the differences between any given Costco and its surrounding stations. In short, it is equally likely that Costco prices to the area then that there is some unique “Costco price” that will inevitably be dramatically lower than other prices charged.

- Third, looking at prices on a single day as the needs reports do is inherently subject to error, whether by design or not. There is nothing in those reports that certifies that Costco was kept ignorant of when the studies were done, or that the days submitted were the only days on which surveys were conducted. Even assuming that the generated reports were done on random dates and without Costco’s knowledge, the reality is that prices often vary from day to day and from station to station. To have any claim to validity, comparisons need to be done over a period of time to ensure that any given day’s results are not simply a statistical fluke.

- Finally, the comparison between the Costco price and the “average price of all stations in the area” to generate a “savings” of \$283 is patently unreasonable (Ex. Q, p. 3-6). Costco patrons are, by definition, extremely price sensitive since they are willing to sit in line for often extended periods of time to obtain relatively minimal price savings.¹⁶ Thus, contrasting Costco’s price with that charged by stations not using a similar discount price strategy biases the comparison and greatly inflates the purported savings. The only logical approach is to compare the Costco price with that charged by the other lowest price station(s) in the same area. That \$283 figure, moreover, is generated, based on a purported household usage of 1,012 gallons per

¹⁵ Instead of accepting the single day comparisons used by Thomas Point, we compiled a multi-day chart from early March through mid-April 2012 and again for ten days just prior to submitting these comments. The information was compiled from the “Gas Buddy” site, which provides daily price reports on gas station prices. The method used was to do a daily search for prices in the areas of Beltsville, Elk Ridge, and Wheaton as well as searches for prices at all Costco stations in Maryland and similarly all stations in Virginia. Screen shots were made of the Internet searches each day and from those Exhibit 5 was prepared setting up several methods of comparison. The screen shots are all included on the thumb drive provided to Planning staff.

¹⁶ Even a 10 cents per gallon savings on a 12 gallon fill-up, for instance, produces only a savings of \$1.20; waiting in line for 10 to 15 minutes to produce that result generates a rate of return well below the minimum wage.

year (see page 3-6). There is no evidence *anywhere* in the report, however, as to how that figure is determined, so it should simply be disregarded until and unless there is some accounting for how it was created.

Exhibit 5 provides a more realistic and meaningful picture of the applicable cost comparisons. A number of facts are quickly apparent.

- One, the Costco prices (and prices of other stations) at any given location can vary widely and change quickly (note, for instance, the jump of \$.14 a gallon for the Beltsville Costco between March 10 and 12, while the next closest station only changed by \$.02. (That station, though, then jumped by \$.10 a gallon several days later on March 15). Thus, a price comparison on any given day may not be meaningful since a development that raises or lowers prices may hit different stores with different lag times. Moreover, the Costco station has the backing of a large retail establishment; as such, it has significantly more flexibility to adjust its pricing levels than other stations that must survive independently.

- Second, while the Costco price was typically the lowest in Beltsville, this was not always true. The range during the days we reviewed in the first study ranged from \$.00 (i.e. other stations matched its price) to \$.14 less than the lowest price at a nearby station. The higher discrepancies typically last only a day or two before Costco's numbers adjusted to more closely match its neighbors. The average difference between Costco and the next closest station in price was less than \$.07. In the second round, the average difference was only \$.03.

- Third, in the first round, Beltsville prices on average were a bit lower (by a few cents) than the lowest prices in Wheaton prices – but both were significantly less than Elkridge.¹⁷ As the report concedes, prices tend to cluster closely in each locale, so in that respect Costco Beltsville pricing is as much a factor of the Beltsville pricing structure as anything to do with Costco itself. In comparing the Beltsville price and the lowest priced Wheaton station (typically the Freestate), the differential in the first round was from one day when the Freestate was \$.06 cents cheaper, to two days when it was a maximum of \$.08 more. On average, the difference was less than \$.03. During this time period, the cheapest Wheaton station was more than \$.02 *less* expensive than buying at that Costco in Elkridge.

The current study shows that the Costco price differences have tightened and that Elkridge has become more competitive with Beltsville but is still generally a couple cents more per gallon. The difference, though, between Beltsville and the lowest price Wheaton station has narrowed even more – to only \$.02 on average, and the difference with Elkridge is even less – only \$.01 per gallon. Indeed, for most of the period, the lowest price Wheaton station matched Elkridge and the next cheapest station would have only been about \$.06 more (with no waiting in line).

¹⁷ The first few days of current price comparisons indicates that the Beltsville and Elkridge pricing is more similar than it was in the spring. We will need to see whether this holds up.

- Fourth, examining pricing *between* Costco stations in Maryland and Virginia shows a range of prices in the first round between about \$.11 and \$.22 in Maryland and \$.10 to \$.31 in Virginia. (The latter range was affected by the inclusion in the data of stations in the much lower-priced Richmond area, but that simply makes the point that gas pricing is largely determined by the area of the station, not by some determination of an individual retailer.) The current study shows a \$.13 to \$.16 range in Maryland and a \$.28 to \$.35 range in Virginia (again taking into account the much lower range elsewhere). Thus, it is again clear that there is no “Costco” low price; rather, Costco prices to the competition and generally appears to seek to sell just a few cents below the surrounding area. Thus, there is no basis to compare Costco prices at any particular station and assume that those prices will carry over to any other locale (or any reason to believe that Costco drives the competition, as opposed to vice versa).

In short, if one used a more reasonable 5 to 10 cent maximum potential strategic pricing differential between a Costco price in Wheaton versus the local discount stations, this would reduce the alleged saving for the 1,012 gallon household from \$283 to more in the range of \$50 to \$100 (even assuming that 1,012 gallon figure had any validity). If that figure is overstated, the savings go down even more. Similarly, if one does not buy 100% of one’s gas from Costco, or occasionally fills up outside the local area, then the projected savings would also decline. The net effect is that any savings from the station may well be less than the cost of the membership needed to access them. In short, the proof of these alleged cost savings is virtually non-existent – and certainly not enough to prove a “need” for this station in the area to obtain them.

One must also remember that such savings *only* accrue to the 23% of the neighborhood that is Costco members. The other 77% receive nothing or perhaps loses ground if the arrival of the Costco store drives out other discount operators to which Costco must pay attention in pricing its gasoline. In that regard, Costco asserts that its station does not lessen competition in the surrounding area (Ex. Q, p. 3-6), pointing to the recent opening of a new WaWa near the Beltsville station. However, in the original October 2010, “needs report,” it was noted that there were *eight* stations near Beltsville (not counting the WaWa store that was not yet built at that time); the current report notes that there are *seven* stations *including* the WaWa store, meaning that only six of the eight original stations are still there two years later. We will further discuss the effects of the Costco station in the next section.

c. Station Impact (Section 3.2.3)

This section is conclusory and contradictory and provides little meaningful perspective on the likely impacts of the opening of the station. Much of the discussion blandly suggests that stations with service bays will thereby create sufficient customer loyalty so as to generate gasoline sales. The report provides no evidence to suggest that such loyalty exists with respect to stand-alone purchases of gasoline. The report also states (Ex. Q, p. 3-7) that several of the stations in the study area (i.e., those near Glemont and Viers Mill North) the Beltway are far enough away that the competitive impact will be minimal. This flies in the face of the definition of the study area as comprising stations that are in competition with each other for the same customers. Moreover, since Costco states elsewhere in the report that *its* customers at least are willing to drive 15 plus minutes to get to Beltsville, it makes no sense to say that they would not drive 5 minutes to get to the cheapest non-Costco station in Wheaton.

The report further notes (Ex. Q, p. 3-8) that there has been a decline of 7.1% in the number of stations between 1997 and 2007. It argues that the local stations may be obsolete or inefficient and may fail regardless of Costco's action and blandly concludes that those with competitive prices, customers with service-related loyalties and the best locations are more likely to stay strong. Even if true, none of that indicates what the impact is likely to be on the existing stations' continued viability and what detriments the loss of one or more stations will impose on the community.

Even an "obsolete" station may well provide numerous amenities to the entire community that Costco does not. Similarly, with respect to jobs, Costco expects to sell the volume of several average stations with only two attendants on duty. If several stations fail, their combined job losses could easily exceed the jobs created by Costco.

Costco suggests that the survival of stations in Beltsville shows that it does not necessarily put other stations out of business. Part of the reason for that is undoubtedly the fact that it does not sell to 75% of the public. Other reasons, though, may be that even many Costco members may be unwilling to wait in the lines at that store that result from its lack of capacity to serve its regional membership and buy gas at other nearby stations. If, as Costco asserts (page 3-10), this station will pull approximately 4.2-4.8 million gallons or 35-40% of the existing sales volume (i.e., a total of 12 million gallons) in Beltsville away from that location and to the Wheaton area, that reduction in pressure at Beltsville may allow Costco to capture more of the business of its customers leaving less for other stations in the area. Thus, opening the Wheaton store may increase competitive pressures not only in Wheaton but in Beltsville as well.

It is difficult to tell, though, what actual impact can be expected on the competing stations in Wheaton because the report fails to quantify several of the most important numbers in that regard. *It nowhere specifies what sales Costco expects for its Wheaton station.* One might guess that if the station is a third larger than Beltsville (16 pumps versus 12), it would have a third more sales, or 16 million gallons, (although that likely exceeds pump capacity). Or, since there are more than twice as many households in Wheaton as in the Beltsville area (see page 4-3), one might assume twice as many sales as the 12 million gallons sold there. Or, one might assume twice or more the 8-9 million gallons sold at Elkridge, since again, there are more than twice as many households. All of these are possible extrapolations of a number that unquestionably should be in *this* report. (Elsewhere in the Special Exception papers, the figure of 12 million appears and we understand that Planning Staff are utilizing that figure, but, astonishingly, one cannot find that most basic number anywhere in Exhibit Q.)

The report is equally opaque in several other respects: it makes no effort to quantify how many of the 4.2-4.8 million gallons of sales coming to Wheaton from Beltsville are from the study area specifically (as opposed to the broader Silver Spring/Wheaton area); it does not indicate what portion of the 12 million gallons it expects to sell to persons in the study area, and it does not discuss whether persons in this area will buy more gas here than they did before, above and beyond any purchases repatriated from Beltsville.

Thus, it is impossible to tell whether the report assumes a) the new station will merely substitute for a large volume of existing study area sales (thus leaving the “need” that it purportedly identifies as still existing while harming existing stations by diverting sales from them) or b) residents will buy more gas here than they did before while leaving the existing stations with the same sales volume (closing the need “gap” *without* harming other stations) or c) whether it will draw others from further away to come to Wheaton to buy gas that they had previously purchased outside of Wheaton (reducing the calculated “gap” without actually providing for any more of the *neighborhood’s* needs). Costco states (Ex. Q, p. 3-10) that *its* primary market is for customers within a 15-minute drive radius, which far exceeds the boundaries of the study area for this report. Thus, it is clear that some – many?, most? of the additional sales will be to persons who do not live in this neighborhood. But, how much will that number be? How much of the station’s sales will be to *this* neighborhood? One can find *no* useful information in the report on that question.

In short, this station would increase Costco’s warehouse sales and would likely benefit non-residents seeking to buy gas but there is no evidence that it would provide any significant benefit to the local neighborhood. *Thus, there is a significant mismatch between the proposed Costco sales market in Wheaton (most of Montgomery County and well into the District of Columbia) and the local area in which the “need” assessment is to be made.* Costco does not propose to serve the need of this community, it proposes instead to serve the needs of its *members*, a group scattered far beyond Wheaton and the study area.

A final point of note is that the projected 12 million gallons of sales will use up virtually every drop of the purported 13.1 million gallon “gap” in supply that the need report separately calculates. Thus, its sales will usurp the *entire* need capacity for this area, making it difficult for any other traditional station to enter the area to sell to the neighborhood, even though much of that 12 million gallons in sales will surely be made to persons residing far outside this area. To be sure, a station is not required to sell only to persons in the neighborhood and normal stations sell to all comers, including those passing through from elsewhere. But, stations are not typically designed and *intended* to sell to a market that greatly exceeds the neighborhood; such sales are incidental, not the *sine qua non* of their business. Nor does a single station typically so occupy the market that it preempts the ability of other, locally-oriented stations to enter the field. But that is exactly what this proposed Costco station could and would do.

3. Need (Section 4)

At this point, after all of the preliminary discussion, the report finally approaches the question of “need.” Despite the title, like the rest of the report, it provides no analysis of “need” in the sense of “necessity.” Rather, it purely is based on a set of marketing numbers that are intended to serve a limited – and much different – purpose than what is a stake in a Special Exception.

a. Retail Gap (Section 4.2)

The report is based solely on data from a “Nielsen” report. That report generates a dollar value for calculated gaps between purported supply and demand for a product or service in an area. As the report notes, what it measures is the difference between estimated *actual* sales and “demand,” which is “*measured by potential sales.*” According to the report, (page 4-1), a “gap” between sales and demand (as those terms are used in the highly artificial sense defined in the report) reflects an “opportunity” for a new venture if the number is positive. The report showed a figure of \$71 million, which is then translated by a formula into actual gallons; i.e., in this case 13.1 million gallons per year of “need”¹⁸ purportedly not being satisfied by existing stations.

i. Retail Gap issues - a critical analysis

The Nielsen materials in Appendix D make clear that this “gap” analysis is a *tool* for companies to investigate where a sales opportunity *might* exist by determining if there are potential sales that *might* be captured. The analysis does not (and cannot) purport to show that consumers are *actually* demanding more of a particular shop in their area or that they are unhappy with their choices as to where to obtain the product. Rather (as set out in Appendix D), the report merely takes an estimate of the total purchases that households will make of a given item and then determines what portion of those total purchases happen to be made in the local area of the household. This is inherently problematic for transitory goods and services that are likely to be consumed elsewhere than in the home locale and hence are not “captured” in the home market.

Gasoline is an obvious example of this issue, since cars travel widely and the driver may choose to fill up outside of the local area for any number of reasons. Thus, the fact that not all purchases are made locally says little or nothing about whether there is a need for additional capacity in a given area. *Put another way, this calculation may be little more than a proxy for the price comparison* discussed above – i.e, given a choice, people prefer to buy cheaper gasoline and, if it can be found elsewhere, may time their purchases to be near such a station. It certainly does not mean that there is any lack of capacity in the local area to supply existing demand.

The limited meaning of these numbers can be readily seen from another example – the Nielsen report also shows a gap of some \$53 million for food and drinking establishments in the Wheaton area. In view of the plethora of restaurants in Wheaton, their diversity, and the lack of long lines virtually everywhere, it is clear there is no true shortage here. Rather, what that gap

¹⁸ In the first two need reports, Thomas Point used a figure of \$63 million, which was not updated between reports. It translated that dollar figure into gallons, by using a portion of the sales (represent the ration of gasoline sales to all sales) and then dividing that number by the then-price of gasoline. The rather artificial nature of this exercise can be seen by noting that the higher the price of gas, the lower the number of resulting gallons and vice versa. Thus, the “need” gap dropped from 13.8 million gallons in 2010 to 12.1 million gallons in 2011, solely because the price of gasoline changed from \$2.98 per gallons to \$3.40 per gallon.

likely reflects is the fact that many local residents spend much of their restaurant budget on *lunch* which they buy in downtown DC *where they work*. The empty restaurants in Wheaton at lunch cannot be readily discerned solely from the Nielsen “gap” numbers (nor will adding new restaurants in Wheaton do anything at all to capture those lost “lunchtime” dollars).

Nielsen asserts in Appendix D (page D-4) that any gap shows that “demand in a given area is meeting or exceeding the available supply and potentially supplementing additional demand potential by going outside of the given geography.” However, as shown above, that is patently incorrect, since there is no effort in this report to estimate either local actual supply or actual demand. Rather, the report compares existing *sales* (not available supply) with *potential* demand (if all possible use of a product were bought within the area). If there is a discrepancy, that may reflect a lack of supply but it equally may reflect any number of other reasons why a particular commodity is not “demanded” from the local area although it may be consumed overall. We sincerely doubt that Nielsen would ever content that their numbers are anything but a starting point, not an authoritative determination of “need” in the sense Park and Planning is required to analyze. At most, *if this report is completely correct, then there may be a potential for local stations to capture sales of an additional 13.1 million gallons of fuel that neighborhood households buy elsewhere*. That is a very different question, though, from whether that purported need will be satisfied by anything *this* station will supply.

ii. Supply, demand and *this* station.

The Thomas Point report is based on the uncritical assumption that any “gap” emerging from the Nielsen numbers is automatically one that can be reasonably expected to be filled in the area and that shows “need” within the meaning of the Special Exception requirements. *That is not true*. In Special Exception S-2743, Mr. Joseph Cronyn (again a witness that Costco has elected to retain as an expert in other regards) testified (p. 30) in regards to carrying out exactly this kind of analysis and stated, “The area itself is never going to capture 100 percent of those purchases. Applying a reasonable estimate, used in Prince George's County and other places in the Washington area, about 60 percent of those household purchases are actually going to happen within the market area.”

Thus, before one can determine whether any actionable gap exists, one must know not just what the dollar figure represents but also the underlying supply and demand data. If, for instance, the potential demand was for 100 million gallons and 80 million gallons were already being sold in the area, then this “gap” is just part of the normal slippage of sales that do not inevitably match up 100 percent between demand and actual purchases. If on the other hand, the demand was the same, but only 50 million gallons were being sold, then the 13 million gallon “gap” might be meaningful. Yet again, though, there is *no information at all* about actual sales in the study area or the potential demand. Thus, one has no ability to assess how this “gap” relates to the 60% rule of thumb stated by Mr. Cronyn.

The other, most important point of note is that the vast majority of the “need” shown in this report (\$61 of the \$71 million dollars) is for gas stations *with convenience stores*. Probably because of the relative age of the stations in this area, stations with true convenience store are relatively scarce and the items they sell relatively meager. Thus, *that segment* of the gasoline market is indeed perhaps lacking in the study area. Yet, Costco proposes to build a huge station with *no* amenities of any kind, much less a convenience store. Thus, it is *not* proposing to meet the need that exists; rather it proposes to create a mega station *without* a convenience store as to which there is, at best, less than a 2 million gallon gap.¹⁹ Worst of all, by building this station without amenities, it will make it *more* difficult, if not impossible, for a station with amenities to enter the market.

We further note that the *Montgomery County Snapshot*, dated July 2010, provides an analysis for the county as a whole that is quite similar to the Nielsen approach. On page 31, it shows that county-wide, gasoline stations purportedly capture only 44% of the total consumer demand for Montgomery County.²⁰ The Fifth Councilmanic District, though, which largely corresponds to the study area, had a *higher* capture rate of 49% than the county as a whole (page 103). And, when further broken down, while this area captured only 40% of the “gasoline station with convenience store” demand, it captured a whopping 75% of the “other gasoline” station market – the precise niche Costco promises to provide (pages 104-05). Once again, it is clear that Costco is seeking to take advantage of a “need” that it will not actually fulfill. Moreover, that 75% capture ratio for the type of station that Costco falls under is well above the 60% that Mr. Cronyn testified was normal.

The report’s only response to this critical point is the feeble assertion (Ex. Q, p. 4-2) that *its* customers may “find it convenient” to shop for gas at the same time they visit the warehouse. While one can give the drafter of the report points for inventiveness, it is patently obvious that a mega warehouse store that can only be used on a members only basis is not a “convenience store” within any accepted meaning of the term.²¹

¹⁹ \$10 million divided by 71 million is 14%; times 13.1 million gallons total = 1.83 million gallons.

²⁰ That figure alone shows that one must use some degree of caution with these numbers. One doubts that anyone would suggest that the county is so understocked with gas stations to the extent that it needs to more than double their numbers.

²¹ The NAICS categories referred to in this report use the designation of 447110 for gas stations with convenience stores. The classification of 44512, used for stand alone convenience stores, defines them as “convenience stores or food marts . . . primarily engaged in retailing a limited line of goods that generally includes milk, bread, soda and snacks.” Whatever else one can say about a Costco warehouse, it plainly does not fall under that definition; rather it is included in category 45291, “warehouse clubs and supercenters.” Finally, Costco’s own report, Exhibit O, p. 17, states explicitly that the station will “have no convenience store.”

In short, the “need” report here neither defines a top-line number for actual demand nor does it include any comparable reduction of that demand number, when deciding how much of a gap exists. Planning staff should require Costco to carry out a similar analysis and reduce its needs claim by this unavoidable amount of demand that you are “never going to capture.” If one uses the 75% figure used by the Council and compares that to a normal capture rate of 60%, it is apparent that this region – as we have argued – is already overserved with traditional gas stations. Similarly, the Nielsen gap figures show at most only the smallest amount of potential demand for a bare bones gas station. Thus, even on the applicant’s terms, it has most assuredly failed to demonstrate that there is any meaningful “gap” to be filled and, if there were, no indication that *this* station (as opposed to traditional neighborhood based stations) would meet that need.

b. Market Areas; Future Driving Patterns (Section 4.3 and 4.4)

The report then turns to population growth estimates, which purportedly show an average annual increase of .37% through 2017 for resident population and .75% for employment growth. The report then states that “*if gasoline sales grow at the same rate,*” then overall sales will supposedly increase by 162,000 gallons a year. However, since the report contains *no information* on actual current sales, there is nothing to which such increase figures can be applied. Again, we have asked that Costco be required to provide this information. Absent such data, this discussion should be stricken as having no factual basis.

Equally critically, the bland reference to “*if gasoline sales grow at the same rate,*” conceals a very profound truth. Gasoline sales are not now *and will not* in the future grow at the same rate as the population. Among the factors causing that change are that a) current CAFÉ mileage standards will increasingly significantly in upcoming years (from 35 miles per gallon by 2016 to almost 55 miles per gallon in 2025), b) current new cars have already risen from 20 to almost 24 MPG in just the last few years; c) sales of those new cars are brisk, bringing them into the market and quickly raising the overall MPG in the driving population; d) the population in Wheaton is much more transit-oriented than the nation as a whole and that will result in less gasoline use for a given population size, e) a very large portion of the projected growth is expected to take place in the CBD where it is highly likely that virtually all residents will be primary mass-transit users at least for commuting,²² and f) the sector plan envisions strong efforts to continue to increase transit usage and reduce reliance on cars.

The prior reports completely ignored these developments. The new report, purportedly responds thereto with less than a page of discussion that briefly skims over these new – and exciting – facts. The report does concede that, under the June 2012 Annual Energy Outlook

²² The traffic report, for instance, relies on a projection that, out of the 486 units being built at the Safeway site, there will only be an additional 114 outbound trips in the morning peak hour and 108 inbound trips in the evening peak hour. While, clearly, not everyone travels at the peak, these figures strongly suggest a major capture of trips from such new developments by the available mass transit.

report, gasoline usage was expected to decline until at least 2025 and only increase slightly after that, but continues to argue that need is shown for a station in 2013 based on purported growth that will not occur until a dozen years later. (Ex. Q, p. 4-4). Even that analysis, though, is already out of date. ***The most current projections from the federal Energy Information Administration, in its 2013 early draft guidance, issued in late December 2012, show that gasoline usage will continue to decline through 2040, decreasing from about 8.5 to about 7.5 million gallons per day.*** The report can be accessed at www.eia.gov/forecasts/aeo/er/pdf/0383er%282013%29.pdf. The summary pages are attached as Exhibit 6. Thus, there clearly is no growing need nationally (and likely less in this area than in the nation as a whole). In short, there is no “need” now – and there will be less “need” every year going forward for the next thirty. We will leave it to the next generation to analyze in 2040 whether a station is needed; it is sufficient for the moment to be clear that this station is not needed now.

OUR CONCLUSIONS

- The report lacks many of the most crucial numbers necessary to adequately analyze the issues here. Thus, much of its discussion should be stricken as inadequately documented and incapable of being properly reviewed.
- Existing stations have supply capacity far in excess of any need for sales to the neighborhood or other persons doing business here.
- The proposed station provides no amenities to the neighborhood beyond an additional supply of gasoline in an already saturated market.
- It will serve only a small portion of the community while pulling in traffic from all over the region. And, by virtue of the overutilization of its capacity, it will have significant lines of queuing cars throughout much of its operations, lines that cannot exist at the existing stations, due to their constricted footprints and the bar on spilling traffic out onto the highway.
- As a result, all of the burden from that congestion and concentrated effects of a station (magnified by the huge size of this station) that draws from all over the county and the District of Columbia will be imposed on a community that will derive little benefit therefrom.
- There is unlikely to be a significant pricing advantage for the community (to the extent they can use the station) and, in any event, minimal pricing differences cannot overcome the standard to show “need” for a station. Any other result would simply allow for a bidding war rather than the sensitive analysis required under the Special Exception.
- There is no showing of “need” based on the Nielsen calculations. The report unreasonably suggests that need is shown anytime less than 100% of the potential demand is provided in the area. The existing supply is more than adequate to meet a reasonable portion of the potential demand.
- Any supply gap that exists is for a different kind of station than that proposed here. Conversely, by building a station that draws in regional business, Costco will preempt and usurp the ability of the community to have stations build that will actually serve those community needs.
- Aggregate demand will continue to decline until at least 2040, obviating any argument that the station is needed now to deal with future growth. Moreover, the nature of population growth in this area is likely to be even more transit-oriented than the nation as a whole.

BASED ON ALL OF THE ABOVE, COSTCO HAS FAILED TO PROVE THAT THERE IS ANY “NEED” FOR ITS STATION IN THIS AREA.

ATTACHMENT 24C

The New ZTA and Costco's Latest Application for a Special Exception An Outline of Concerns

**prepared by
Larry J. Silverman
Environmental Consultant**

7308 Birch Avenue
Takoma Park, MD 20912
301-346-3757
ljoelsilverman@gmail.com

January 2, 2013

What does the new ZTA which is now law, mean? And how should it influence the conduct of the Planning Commission and the Appeals Board? We need to look at this ZTA not as a political event in a long chain of political events but as the law of Montgomery County. Has the Planning Commission formulated a legal interpretation of this ZTA? Have planning authorities developed a policy matrix for carrying out the intent of this law? Could they share it?

We have an interpretation of this law which would bar construction of the proposed mega station as a summary matter, based both on clear intent of the law and on raw numbers.

Size matters: The basic message of the ZTA is that size matters when it comes to gas stations. The law references one size, 3.6 million gallons + per year. It instructs zoning and planning authorities to treat larger stations differently from the typical stations of Montgomery County. The message to planning authorities is to give these larger stations much greater scrutiny, not judge them by the same standards that were applied to the 26 smaller gas stations in the neighborhood over the years, as they faced zoning hurdles.

How much does size matter? There was great uncertainty in the Council and in the Planning Board as to this question. So the Council drew a line at 3.6 MGY. They were satisfied by evidence that stations bigger than that were potential hazards to children and others nearby. They therefore used their best judgment to come to a conclusion based on the information they had seen, that regardless of a company's testimony from paid experts, any closer than 300 feet is prohibited. The applicant was denied the opportunity to argue that less than 300 feet from people was a safe distance.

Council was strongly motivated to protect schools. Council members referenced gas stations that had recently located too close to schools. The Council did not single out the Stephen Knolls School. Council members expressed the view that they could not decide a pending case. And therefore although they heard testimony on the Knolls School, they did not pass on how close a gas station should be to it. In referencing schools for special protection, the Council necessarily established its minimum protections in reference to average or typical schools and playgrounds near gas station of 3.6 million gallons. What if the school held a super-sensitive population? Clearly by establishing a minimum volume of gas sales for typical schools, the Council invited zoning and planning to add protections for atypical schools such as Stephen Knolls. Otherwise the action would make no sense.

In addition to size, **Distance matters.** Buffers are good. Council established a buffer of 300 feet, for 3.6 MGY, as a minimum protection for County owned and other schools and recreational facilities, as well as hospitals and other sensitive uses. What if the volume tripled to 12 MGY? Surely the planning agencies could triple the buffer to 900 feet, as a matter of good

science and common sense, especially when the affected population was many times as sensitive as the general population.

The Council did not have the expertise or the opportunity to rule on every case and made an effort not to rule on the instant case.

The reasoning behind the buffer is **Public Health**. Council found a public health risk to people in certain land use categories within 300 feet of a gas station a third the size of the proposed Costco. It did not make residences part of the places subject to the minimum. And with some reason. Council had very little information as to the impact of such a rule county wide, and was reluctant to pass a hard and fast limit under the circumstances. The Planning Commission provided very little information and no real advice on this point. Council's purpose in focusing on schools which have been the center of US EPA activity in this area, was not intended to say that the health effects on people in covered land uses would be any different from the health effect on people not in covered areas. Council instead relied on the common sense of the Planning Commission, to protect public health generally. Under the latest Costco plan, the station will be within 150 feet of residences, half the 300 foot buffer for other uses. It was not and could not be the intent of this law to subject people in houses to risks judged by Council to be unacceptable and intolerable to people in schools and playgrounds, except that the buffer is cut in half and the size of the facility is tripled. Similarly, the employees and shoppers of Costco will be subjected to even greater risk as a result of Costco's decision to allow no buffer between their lungs and the biggest fueling station in Montgomery County. The ZTA was not intended to cover such abuses.

Granting a Special Exception in this case will set a precedent for the Montgomery County for many years to come. Will there ever be a neighborhood as close to a mega gas station as Kensington Heights is to the Costco behemoth? Will there ever be a school or medical facility that will argue successfully for a buffer in excess of 900 feet because of the sensitivity of its population? Is the Planning Commission willing to establish such precedents? Especially in light of the clear direction of the ZTA to closely scrutinize big stations and to equal or exceed the minimal and beginning protections established by Council.

We believe a clear focus on size and distance compels to Planning Commission to recommend rejection of this application.

During the course of this struggle the EPA issued new rules for ultra fine particulates that were not in effect when Costco's experts performed their calculations. During the same time a number of new and important medical studies came out demonstrating still newer risk factors to populations near gas stations, even average gas stations, some of which studies will not be reflected in EPA rules for months or years to come. Knowledge is changing but the direction weighs against allowing a facility of this size to be squeezed into the space provided. Given the trends as well as the uncertainties, we believe the Planning Commission should come out against this proposal in the strongest terms possible.