

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY

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:
PETITION OF : Case No. S-2863
COSTCO WHOLESALE CORPORATION : OZAH No. 13-12
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A hearing in the above-entitled matter was held on August 19, 2014, commencing at 9:36 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Seventh Floor Council Hearing Room, Rockville, Maryland 20850 before:

Martin L. Grossman
Hearing Examiner

A P P E A R A N C E S

On Behalf of the Petitioner:

Erich Brann

Patricia Harris, Esq.

Michael Goecke, Esq.

On behalf of Stop COSTCO Gas Coalition:

Abigail Adelman

Larry Silverman, Esq.

On Behalf of Kensington Heights Civic Association:

Karen Cordry, Esq.

Michele Rosenfeld, Esq.

On Behalf of Kensington View Civic Association:

Eleanor Duckett

P R O C E E D I N G S

1 MR. GROSSMAN: This is the 37th day of a public
2 hearing in the matter of COSTCO Wholesale Corporation, Board
3 of Appeals S-2863, OZAH No. 13-12, a petition for a special
4 exception pursuant to Zoning Ordinance Section 59-G-2.06, to
5 allow petitioner to construct and operate an automobile
6 filling station which would include 16 pumps. The subject
7 site is located at 11160 Viers Mills Road, Silver Spring,
8 Maryland. That's Lot N-631, Wheaton Plaza, Parcel 10, also
9 known as Westfield Wheaton Mall, and is zoned, well, C-2 at
10 the present time. That's general commercial.

11 The hearing was begun on April 26, 2013, and we've
12 had 36 sessions. This is the 37th session. Departing from
13 my usual script, I will not announce a next sessions because
14 this is the last session. The record will close completely
15 at the conclusion of this hearing, except for the receipt of
16 the final transcript of this session. Will the parties
17 identify themselves, please, for the record?

18 MR. GOECKE: Good morning, Mr. Grossman, Mike
19 Goecke, on behalf of COSTCO.

20 MS. HARRIS: Good morning, Pat Harris, on behalf
21 of COSTCO.

22 MR. BRANN: Good morning, Erich Brann, COSTCO.

23 MS. ROSENFELD: Michele Rosenfeld, on behalf of
24 Kensington Heights.

E X H I B I T S

Exhibit No.	Marked/Received
633 Request to record hearing	8
634 Comments on Conditions by Renee Kamen	8
635 COSTCO's proposed modification of possible Condition No. 6	75
636 Response of Kensington Heights Civic Association to hearing examiner's comments regarding any potential condition concerning idle	112
637 Kensington View Civic Association Statement regarding possible condition as to entrances available to COSTCO	129

1 MS. CORDRY: Karen Cordry, Kensington Heights
2 Civic Association.

3 MR. SILVERMAN: Good morning, Larry Silverman,
4 Stop COSTCO Gas Coalition.

5 MS. ADELMAN: Morning, Mr. Grossman, Abigail
6 Adelman, Stop COSTCO Gas Coalition.

7 MR. GROSSMAN: Ms. Adelman. Do we have Ms.
8 Duckett here?

9 MS. DUCKETT: Yes. Eleanor Duckett, Kensington
10 View Civic Association.

11 MR. GROSSMAN: All right, and we also have quite
12 an audience here today as well. Let's start with some
13 preliminary matters since our last session on May 29, 2014,
14 the following addition exhibits have been filed. 615, was a
15 Memorandum from Ms. Harris submitting the modeling protocol
16 for this case really, for the COSTCO facility gas station,
17 prepared by Sullivan Environmental. And, also building
18 prospers places in Michigan, the full report dated March 30,
19 2012. 616, was the submission of applicants closing brief.
20 617, was an e-mail from me to the parties giving them an
21 opportunity to comment on District Map Amendment G-956 will
22 change the zoning of the subject site from C-2 to GR. 618,
23 was an e-mail from Kensington Heights Civic Association
24 requesting additional time for their closing statement,
25 which was granted.

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1 619, was Council Resolution 17-1166, which adopted
2 District Map Amendment G-956. 620, was Kensington View
3 Civic Association closing brief. 621, closing statement of
4 Stop COSTCO Gas Coalition, and it had an appendix from Mr.
5 Silverman, that's 621A. 622, there was an e-mail between
6 the parties regarding submitting of opposition briefs. 623,
7 an e-mail from Donna Savage correcting items label in
8 Exhibit 460. 624, closing statement of Kensington Heights
9 Civic Association. 625, an e-mail from Ms. Rosenfeld
10 submitting pages referenced in Exhibit 624. Exhibit 626, an
11 e-mail from Ms. Harris, responses from SCGC, KHCA and me,
12 regarding applicant's request to extend the time to submit a
13 reply brief, thereby requiring a continuance of this closing
14 argument date.
15 627, e-mail making notice of the Planning Board on
16 Mount McComas, taking notice I should say, of the Planning
17 Board vote on Mount McComas Pedestrian Path, which
18 essentially, I say, deformatized the path and making it a
19 possibility in the future, but not requiring it as part of
20 the preliminary plan for that property. 628, e-mails
21 between the parties discussing the new hearing date for
22 closing argument. 629, applicant's reply brief. 630,
23 notice of the COSTCO hearing date today. 631, an e-mail
24 from Mr. Silverman, submitting documents regarding
25 conditions.

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1 632, e-mails from me and the parties regarding
2 conditions, and I attached as 632A something entitled,
3 COSTCO conditions the hearing examiner is considering
4 recommending in the event the Board of Appeals grants the
5 special exception petition. As I explained, by the way, in
6 that e-mail and in its attachment, I have made no findings,
7 whatever, this is merely so that I could have the parties
8 have an opportunity to comment on conditions which might be
9 included if I were to recommend approval, and which in any
10 event, I would attach as an appendix to my report if I
11 decided to recommend against approval, and the Board of
12 Appeals decided to go the other way. Just so they would
13 have some guidance regarding conditions. So, similar thing
14 was done by the technical staff in their recommendation of
15 denial.
16 There were also a couple of things that are now
17 included in 632, perhaps we should break them out
18 separately. There was a request from Donna Savage to record
19 this proceeding, which I granted, in accordance with the
20 Board of Appeals rules. And, there was also a response by
21 Renee Kamen of technical staff regarding the proposed
22 conditions list that I submitted, and she had a couple of
23 comments on that. And, as I say, we may give them, they're
24 right now, I think, included as part of 632, and what I'm
25 going to do is for the request to record the hearing, I'm

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1 going to make that Exhibit -- and the response -- Exhibit
2 633. And 634 will be the comments on conditions by Renee
3 Kamen.
4 (Exhibits 633 and 634 were
5 marked for identification.)
6 MR. GROSSMAN: And, I don't recall if I said at
7 the very beginning, and perhaps I did not that, and I should
8 have, that, this hearing is conducted on behalf of the Board
9 of Appeals. My name is Martin Grossman, I'm the hearing
10 examiner, which means I will write a report and
11 recommendation to the Board of Appeals which will make the
12 decision in this case. All right. Yes, ma'am?
13 MS. ADELMAN: Mr. Grossman, do you mind repeating
14 what 633 is?
15 MR. GROSSMAN: That was a request from Ms. Savage
16 to record this oral argument, and my granting of it.
17 MS. ADELMAN: Thank you.
18 MS. CORDRY: And, just one other point. Just as a
19 typo in 618, it's listed as being 6/17/14 is actually, it
20 would have been 7/17/14.
21 MR. GROSSMAN: 618, I'm sorry and?
22 MS. CORDRY: The date on that would have been
23 7/17/14.
24 MR. GROSSMAN: Okay. That's on Exhibit 618. All
25 right, are there any other preliminary matters? Seeing no

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1 hands, shall be proceed with the discussion of the potential
2 conditions before we get into the oral argument? Does that
3 make sense? I see a concerned expression on your face.
4 MS. CORDRY: The only question is whether
5 everybody in the audience wants to listen to conditions too,
6 or whether they were here to listen to oral argument. For
7 us, I don't think it makes any difference.
8 MR. GROSSMAN: What's your pleasure?
9 MR. GOECKE: We were planning on beginning with
10 closing argument.
11 MR. GROSSMAN: All right. So let's begin with the
12 closing argument, since we seem to have some consensus on
13 that. And, I would say that the parties have been granted
14 40 minutes on a side for closing arguments, and I have a
15 little electronic egg timer here, my cell phone. So, I've
16 violated the usual provision, I have a live cell phone here.
17 And, I'm going to set the timer for 40 minutes, and when I
18 hit start, when the 40 minutes arrive, a bell will go off
19 and you will turn into a pumpkin. All right. Are you
20 ready, Mr. Goecke?
21 MR. GOECKE: I am, Mr. Grossman.
22 MR. GROSSMAN: All right. Then, let us proceed.
23 MR. GOECKE: Before I get into the substance if
24 this case, Mr. Grossman, I just want to take a moment to
25 make some comments to you, and to the opposition as well.

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1 Obviously, this process has gone on much longer than any of
2 us anticipated or desired. It involved a lot of evidence, a
3 lot of exhibits, and a lot of often complicated and
4 challenging issues. And, I think, all of us agree, we want
5 to thank you for your diligence on this case. We think that
6 your effort came through. Your attention to detail, the
7 questions that you presented to both sides during the
8 hearing were much appreciated, and I think, gave us all an
9 opportunity to respond to the issues that you felt were
10 important. And, we hope, created amore robust record that
11 will help you make the best decision possible in this case.
12 MR. GROSSMAN: Thank you. I think we can count on
13 this being a robust record, and the rest of it, I think I'm
14 doing my job, and hopefully, I did it correctly and we all
15 got a fair hearing out of this however it comes out. Now,
16 proceed.
17 MR. GOECKE: Thank you. And, also just one other
18 brief comment, in terms of the opposition, I mean, the
19 record is robust in large part because this is an incredibly
20 important issue to them, and these are folks who have
21 dedicated their time from the community to work incredibly
22 hard. This is a smart group of people, very committed.
23 This a very passionate issue for them. And, in spite of the
24 very contentious issues and the deep divisions that we
25 shared throughout the course of this proceeding, as you

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1 acknowledged at the final hearing, we appreciate their
2 civility and their professionalism in going through this
3 case, and we hope that that also led to a more fair and
4 ultimately accurate and correct decision. But, I just
5 wanted to thank them as well.
6 MR. GROSSMAN: And, I think that comment could
7 apply to both sides. I think this was pursued. I mean, I
8 know, that this is an important issue for both sides, and I
9 think this was pursued with civility by both sides and a lot
10 of intelligence, and a lot of work. So, I appreciate that.
11 MR. GOECKE: And so, here we are. And, we're at
12 the end, day 37 of this process, and in spite of the effort
13 and the sacrifices, and the work that we all put in, we
14 think that this process worked. Ms. Harris and I feel very
15 fortunate to work for COSTCO, a company that has been
16 considerate of and responsive to the community concerns.
17 And as a result of that, we think the petition for a special
18 exception is even stronger today than when we began.
19 During the course of this hearing, the opposition
20 made a lot of arguments, they raised a lot of points, and
21 when it was appropriate, and where we were able, we modified
22 the special exception to address some of those concerns or
23 to voluntarily agree to conditions that will hopefully
24 mollify or mitigate some of their concern. We've briefed
25 these, but to highlight a few, again, the elevated five foot

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1 pedestrian walkway that's going to go along the ring road.
2 It's going to enhance the pedestrian experience. It's going
3 to be a benefit that's not there right now, and this was
4 something that was very important to them, and we're pleased
5 that we were to deliver it.
6 We've also expanded the East West Highway, or
7 agreed to expand, rather, the East West walkway, within the
8 parking lot itself. So when the gas station, if it's there,
9 will have a dedicated walking area for the pedestrians to
10 make it safer and more useable. We listened to their
11 concerns about the traffic, and the congestion that might be
12 caused by the incremental increase. And as a result,
13 decided to dedicate employee parking in the parking lanes
14 adjacent to the gas station, so that when those cars are
15 parked there, they're going to be there for the duration of
16 an employee shift, minimizes the ingress and egress,
17 minimizing the traffic and congestion.
18 It became clear early in this process that there
19 was lots of parking spaces in the garage that were not being
20 utilized. As a result, COSTCO has posted signs in the
21 warehouse, and now there's been testimony that those spaces
22 are being utilized, even though, even on the busiest days
23 there's still a lot of empty parking spaces at the mall. In
24 the future, if a gas station is there, COSTCO will agree to
25 monitor any accidents that might occur. Collecting valuable

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1 information both on a pedestrian and traffic level, that the
2 County and the opposition may use, and there's other smaller
3 details such as an expanded enhanced vegetation and
4 landscaping. But the point is, throughout this process we
5 have tried to be transparent and responsive.
6 And, as you've alluded to several times during
7 this hearing, there's no discovery process. There was no
8 obligation on the parties to exchange information.
9 Nonetheless, we tried to be very responsive to their
10 requests, and did, in fact, produce them with a lot of
11 information that we were not required to, often on short
12 deadlines and short notice. And I'm sure they'll take
13 exception with the speed with which we gave some of it to
14 them, and the degree to which we did. But the reality is,
15 we had no obligation to do that, and it was our effort to be
16 responsive. And this is something that COSTCO has done
17 since the inception of this program. They've had community
18 meetings. They've tried to input from the community. In
19 fact, the green screen wall that we've talked so much about,
20 was born from conversations that COSTCO had with the
21 community.
22 At one of the meetings, someone wondered whether
23 or not people in the residential homes will be able to see
24 the gas station. So COSTCO looked into this more
25 thoroughly, and met with its experts and devised the green

1 screen wall. And now that green screen wall will totally
2 isolate the gas station from the residential community.
3 Even if people are standing in the second floor of their
4 homes, they're not going to be able to see the gas station.
5 And, it's not merely the gas station, it's the mall itself.
6 The wall will protect from view a large portion of the mall
7 as well. Thus, further segregating the two different uses
8 here, the residential use in the neighborhood, and the
9 commercial uses in the mall itself.

10 We heard a lot about the approach COSTCO takes as
11 well from its Director of Gas Operations, Tim Hurlocker.
12 And, Mr. Hurlocker has been with COSTCO since the inception
13 of its program to sell fuel in open gas stations. And, he
14 talked about the careful deliberation the company took when
15 deciding whether or not to venture into this market. And,
16 they realized there was -- it's an industry that's fraught
17 with complications with potential environmental problems.
18 And they decided if we're going to do this, we're going to
19 do this right. And we're going to be safe, and we're going
20 to exceed expectations. And, he talked about his mantra
21 that he tells to himself, and that he shares with his
22 colleagues, with great volume comes great responsibility, is
23 what he said. And, he sort of laughed because it was a
24 paraphrase of a Spiderman line. But, it's not a laughing
25 matter and, it's something that Mr. Hurlocker takes very

1 seriously, and it's something that COSTCO takes very
2 seriously. And this is evidence by their impeccable safety
3 record over the past 20 years with their now around 400 gas
4 stations that they have throughout the country.

5 Why are COSTCO gas stations so safe? Well, Mr.
6 Hurlocker told us. First, their people. The people are the
7 first line of defense. They train all of their attendants
8 at the gas stations above and beyond often what's required
9 by state or federal law. And these attendants are there
10 always. When the gas station is open, there's at least one
11 attendant at the gas station. And, the attendants aren't
12 selling snickers bars or getting change, or giving lottery
13 tickets, they're there for one reason, to help the members
14 at the COSTCO gas station. Whether it's an elderly person
15 or a disabled person, or someone who needs assistance, or
16 they're directing people to the shortest queue, or they're
17 instructing them that the line from the gas pump can extend
18 all the way over their car so they don't need to go in maybe
19 the queue that they thought they went into. And, if God
20 forbid or someone should have a heart attack, or anything
21 should happen, they're there to respond.

22 Throughout this case the opposition has made a lot
23 of the differences about this gas station, what they call
24 non-inherent, physical or operational characteristics, that
25 they argue create an adverse effect. We maintain that there

1 are several non-inherent physical and operational
2 characteristics that enhance this gas station that make it
3 superior to other gas stations. That make people want to
4 come here, and in fact, drive the need for this gas station.
5 And one of those is the attendants that are there. That's
6 something that's not at every other gas station.

7 The other reason that COSTCO gas stations are so
8 safe is because of technology. COSTCO uses the best
9 technology it can get. The most appropriate technology, and
10 the state of the art or cutting edge technology where it's
11 appropriate. A specific example of that in this case is the
12 use of the arid permeator device, which will attach to the
13 underground storage tanks and capture -- it's undisputed --
14 it will capture nearly 100 percent of volatile organic
15 compounds that would otherwise evaporate into the atmosphere
16 and expose the community. That's a non-inherent physical
17 characteristic that you don't get. And that's something
18 that COSTCO does to make its gas stations safer.

19 Its underground storage tanks and its piping are
20 all double hulled, further reducing the risk of an
21 underground storage spill. They have extensive internal and
22 external monitoring systems so that if a spill or a leak
23 should occur, it's going to be detected quickly. And, they
24 run regular maintenance checks to make sure that those
25 operations are working, and they're doing their job. And

1 this is a formula that's worked for 20 years at hundreds of
2 locations, and it's the formula they're going to apply here,
3 and that's why this gas station is going to be safe as well.

4 So, taking a step back, what is this case all
5 about? In very simple terms, it's about whether the County
6 should allow COSTCO to create, install and operate a gas
7 station in the parking lot of a regional mall. And, we set
8 forth in our brief the reasons why COSTCO meets its burden
9 for all of the general requirements in the code, the
10 specific requirements applying to gas stations, and the need
11 requirements as well. And again, contrary to what the
12 opposition has asserted, there's no obligation that this gas
13 station provide benefits to the community. That's not
14 legally required. However, it's undisputed that this gas
15 station will provide undeniable benefits to the COSTCO
16 members that it serves. More than 4,000 of whom come to the
17 warehouse every day, and by law, are part of the general
18 neighborhood.

19 It may also have effects of benefiting non-COSTCO
20 members. It could drive down prices at other competing gas
21 stations, or if those gas stations aren't able to lower
22 their prices, they may add amenities to help compete with
23 the COSTCO gas station. We don't know exactly what's going
24 to happen. But, what we do know is that they're undeniable
25 benefits to the COSTCO members.

1 Over the course of these 36 hearings dates, COSTCO
2 has presented voluminous amounts of information, had lots of
3 testimony, lots of expert testimony, and we believe have met
4 our burden establishing that we've met the code
5 requirements, that the gas station will be compatible with
6 the neighborhood, and that there will be no non-inherent
7 adverse effects. And, we have, again, detailed a lot of
8 this in our brief, so I don't want to go into great detail,
9 but I do want to touch upon a few of the more over-arching
10 issues.

11 Compatibility, we think, is a challenging sort of
12 an esoteric standard, but we think it's one that's really
13 important to establish, and that we have established, that
14 this gas station will be compatible. And, when you're
15 talking about compatibility, we have to look at the specific
16 location. We have to put this gas station, not in the
17 abstract, but where is it going to be located. It's going
18 to be harmonious with all the surrounding activities because
19 it's going to be in a parking lot of a regional mall. The
20 sector plan specifically designates the Wheaton Westfield
21 Mall as a regional shopping mall. By definition, this
22 regional mall attracts people from the region. They drive
23 there. This is auto centric. It's auto dominated. And
24 there's more than 6,000 parking spaces. And the testimony
25 shows that even on the most crowded days, there's still

1 hundreds and hundreds of parking spaces that are unused.
2 There's the capacity for this gas station. And
3 it's undisputed that there's adequate public facilities to
4 develop not only this gas station, but additional
5 development at the mall. And Westfield has testified that
6 they have the right to do additional development, and that
7 they plan to do additional development sometime, and there's
8 capacity here. It's a highly commercialized area. This is
9 Exhibit 159, I'm pointing here to my right, of a picture
10 we've seen many times, an aerial overview of the Wheaton
11 community and the mall itself. And, on the major arterial
12 roads that surround the gas station, more than 100,000 cars
13 travel every day. This is a heavily --

14 MR. GROSSMAN: Did you identify the exhibit
15 number?

16 MR. GOECKE: Yes, 159. So, over a 100,000 cars.
17 This is a highly commercial area. There's a lot of
18 commuters that pass by here. There's a lot of traffic. So,
19 placing a gas station in this location makes sense, and it
20 is harmonious. Now, the opposition has criticized the
21 location in the mall. And they argue that it would be
22 better if it were placed on a public road. Well, first of
23 all, the code doesn't require us to pick the best location,
24 or to put it where they think is the best location. We just
25 have to follow the requirements. And we maintain that it's

1 better inside the re-road. It's far from the public roads.
2 To the extent that there's going to be an incremental
3 increase in traffic, it's going to be virtually contained on
4 the mall property itself. As Mr. Guckert testified, any
5 delays on the public roads are going to be in perceptible to
6 the driver. A delay of five seconds, and the worse case
7 scenario, for example, at intersection 16.

8 So, this is important because the only people who
9 are going to experience the incremental increase in traffic
10 caused by the gas station are people who choose to go there.
11 There's no intrusion on anybody property rights, or any
12 other rights. This is a regional mall. People expect a
13 certain amount of traffic and congestion at the mall. It's
14 not out of the norm. And, to the extent that they find it
15 inconvenient, or irritating or they don't like it, that
16 doesn't mean it's a traffic nuisance. It means that they
17 don't like it, and they have options. There's an easy
18 solution. They cannot go there, or they can go there when
19 the mall is less crowded. It's within their control. It
20 can't be a traffic nuisance if it doesn't impose any burden
21 on any one against their will.

22 So that's the commercial component about what
23 we're talking about here. But, we've also talked a lot
24 about the residential neighborhood that's in close proximity
25 to the mall. And they're together, cheek and jowl. But,

1 they're totally separate. They're physically isolated. We
2 have the sloped forested buffer physically separating the
3 mall property from the residential community. COSTCO has
4 agreed to install the green screen wall further segregating
5 the two uses. People in the residential community will not
6 be able to see the gas station, they won't be able to hear
7 it, they won't be able to feel it, it will be imperceptible
8 to the senses. Unless they know it's there, or they've seen
9 it for themselves, they're not going to know it's there.
10 It's not going to have any effect on their daily lives.

11 And there's been testimony that the conditions at
12 the mall have changed most recently. And, it's true, the
13 mall is probably less vibrant and less robust before the
14 COSTCO warehouse gas station opened. But that doesn't
15 change the fact that it's still a regional mall.

16 MR. GROSSMAN: You mean before the COSTCO
17 warehouse opened.

18 MR. GOECKE: I'm sorry, I misspoke. Yeah, the
19 COSTCO warehouse is what I meant to say. So, since the
20 warehouse has opened we've heard testimony from folks in the
21 community that it's much noisier. There's idling trucks in
22 the morning, perhaps, and they can hear other things. But
23 again, it's important to distinguish what's happening at the
24 warehouse from what COSTCO's obligation is with the gas
25 station. And, conditions which exist there now are not the

1 responsibility of the gas station, and frankly, are outside
2 the analysis for the special exception itself. The bottom
3 line is that despite these changes recently, the mall and
4 the residential community have coexisted. They've always
5 coexisted, they continue to coexist, and the gas station is
6 not going to change that. It will be harmonious with both
7 the commercial nature of the mall itself, and the
8 residential community.

9 So, the one exception -- well, I know the
10 opposition takes a lot of exception to those points, but the
11 one that I want to address now is emissions. Because
12 emissions are something that you can't detect with the
13 senses. You could be exposed to emissions and not realize
14 that you're being exposed to them. So COSTCO has the burden
15 to show that the emissions are not going to cause any
16 adverse health effects, or any adverse impact on the
17 environment. Well, how do we do that? The code doesn't
18 tell us how. So, COSTCO went, we believe, above and beyond
19 what it was required to do, and held itself to federal law
20 standards. The EPA, national ambient air quality standards.
21 And we believe strongly that this is the appropriate
22 standard to apply here. Why is that? The Clean Air Act,
23 federal law, requires the EPA to set standards that are
24 protective of the public health. And, not just the general
25 public. Sensitive populations.

1 The United States District Court for the District
2 of Columbia, as far back as 1980, analyzed the legislative
3 history of the Clean Air Act and, as we quoted in our brief,
4 from the Lead Industries Association versus EPA case, the
5 District Court said the goal of the air quality standards
6 must be to ensure that the public is protected from adverse
7 health effects. The same standard we have in this code,
8 protect them from adverse health effects. That's why these
9 standards are designed. It goes on, the Center report
10 explains that the administrator, the EPA administrator, is
11 to set standards which ensure that there is a absence of
12 adverse effect.

13 So there we have it again. And, it goes on to
14 talk about, it's not just for known dangers, it's for
15 unknown dangers. The standards must allow, and I'm quoting,
16 must allow for an adequate margin of safety to protect
17 against effects which have not yet been uncovered by
18 research, and effects whose medical significance is a matter
19 of disagreement. So, there's a margin of safety baked into
20 these standards because the law recognizes that there's
21 always going to be dispute. You're never going to have
22 total accord in the medical or scientific community. And
23 that resonates here. We don't have total accord between the
24 experts in this case. But the standards have already taken
25 that into account. They've already heard from some of the

1 top minds in their field, from activist groups, from
2 government, from academia, from industry stakeholders, all
3 of these people have participated in a very robust panel,
4 and a robust process. And, the EPA took all of that
5 information and it came up with its standards. It took the
6 most up-to-date information available, and it updates these
7 standards every five years as required by law.

8 It goes beyond appropriate. These are the
9 standards that must be applied. And why is that? Well,
10 Maryland has the opportunity to apply different standards,
11 higher standards if it so chooses. It has none done so. It
12 has affirmatively decided to apply the EPA standards.
13 Similarly, Montgomery County has not imposed any higher
14 standard or any higher threshold that it would impose on the
15 gas station. So, in the absence of any viable alternative,
16 you have to measure the emissions by the subjective
17 standard. To apply subjective, a discretionary standard, we
18 believe would be arbitrary and would not be supported by the
19 record.

20 MR. GROSSMAN: Let me ask you this. You argue
21 that in your brief as well, it's a big point you've made,
22 and a point you've made here, is the standard here the
23 National Ambient Air Quality Standards, or is the standard
24 here what it said in the zoning ordinance that a burden of
25 showing that it won't adversely affect health in the

1 community, and would the National Ambient Air Quality
2 Standards as a measuring tool?

3 MR. GOECKE: Well, the code requires us to show
4 that -- we have the burden of showing no adverse health
5 effects. But, it provides no measuring tool. So, how do
6 you make that determination without applying some tool? And
7 so in the absence of the code providing it, the EPA is the
8 standard that should be the measuring tool.

9 MR. GROSSMAN: But, it's the measuring tool, it's
10 not the standard. I mean, I think we've used it somewhat
11 interchangeably, and you quote me a number of times as
12 asking the opposition well what standard do I apply if it's
13 not these NAAQS standards, but maybe we've been using that
14 term a little loosely, and really, aren't we talking when we
15 talk about the NAAQS standards we're talking about those as
16 a measuring device for the standard here, which is what the
17 zoning ordinance --

18 MR. GOECKE: Well, I think, I'm not sure if I
19 completely understand, but I think the measuring device, and
20 I'll get to this in a moment, is the modeling. The modeling
21 measures what the anticipated emissions will be. The
22 standards -- I mean, the purpose of an act is to say at this
23 level there will be no adverse health effects. That's the
24 same thing that the code asks. So, that's what we should be
25 measured against, whether or not we violate the standards.

1 If we comply with the standards, then we have met our burden
2 that there are no adverse health effects. And, these are
3 standards that are applied routinely by the federal courts.
4 They've not been overturned. They have the force of law.
5 Nothing else that's been discussed in this case has the
6 force of law.

7 MR. GROSSMAN: Well, there was testimony here from
8 opposition expert Dr. Breyse, and echoed by Ms. Cordry,
9 that suggests that the standards, the NAAQS standards
10 themselves, actually provide a lower numerical standard for
11 one hour nitrogen dioxide when you're away from the actual
12 source. And, and they cite a final rule establishing the
13 NAAQS standards for nitrogen dioxide February 9, 2010, Part
14 III, pages 6479 to 6494. That's Exhibit 424B in our record.

15 Now, I recognize, of course, that the opposition's
16 own modeling expert, Dr. Cole, said that the EPA does not
17 apply a lower measure when it reviews a permitting
18 application, sort of a bright line, in its standards and, I
19 also recognize, of course, that your health expert, Dr.
20 Chase, testified that there won't be health effects even at
21 some lower measurements. But, don't I have to take into
22 account the language in the final rule on NO2, from the EPA.
23 And, let me quote one statement made by the administrator,
24 the administrator concluded that these studies support for a
25 one hour standard that limits the 99 percentile of

1 distribution of one hour daily maximum NO2 concentrations to
2 below 90 parts per billion.

3 The actual formal standard is a hundred parts per
4 billion for one hour NO2 in the EPA NAAQS standards that
5 we're talking about. That corresponds, and I'm continuing
6 the quote to a 98th percentile concentration of 85 parts per
7 billion, and that limiting area wide concentrations to
8 considerably below 90 parts per billion would be appropriate
9 in order to provide an adequate margin of safety. The
10 administrator noted that based on available information
11 about the NO2 concentration gradient around roads, a
12 standard level at or somewhat below 100 parts per billion
13 set in conjunction with the proposed approach would be
14 expected to accomplish this.

15 Specifically, she noted that given available
16 information regarding NO2 concentration gradients around
17 roads -- then there's a parenthetical expression, which I'll
18 omit -- a standard level at or below 100 parts per billion
19 with either 99th or 98th percentile formed would be expected
20 to limit peak area wide NO2 concentrations to approximately
21 75 parts per billion or below. So, I'm not saying that sets
22 the standard. I'm saying, don't I have to consider that
23 evidence along with your evidence in determining whether or
24 not the applicant here has met its burden of proving that
25 there will not be adverse health effects?

1 MR. GOECKE: I think it's fair for you to consider
2 all evidence that's in the record. But, even if you
3 consider that evidence, and even if you decide that you're
4 going to apply a more strict standard than what the EPA
5 applies in issuing permits, what the federal courts apply in
6 administering the Clean Air Act, the evidence shows that
7 COSTCO is far below even those standards. And, Mr.
8 Sullivan's stage 3 analysis show that 63 percent of the
9 standards, so 63, 64 parts per billion. So, even -- and
10 that's still, as he testified, conservatively modeled. And
11 I realize that it's not as conservative as when he began,
12 but there are still numerous conservative assumptions that
13 he testified to at length, and explained in detail in his
14 reports, showing how he got to the number that he got, and
15 he still's far below even the levels that EPA administrator
16 expresses concern about in the passage that you just quoted.

17 MR. GROSSMAN: Okay.

18 MR. GOECKE: And, if I can turn to that quickly,
19 what are we talking about. There's a lot of emissions that
20 are common at gas stations. I mean, but ultimately what the
21 evidence shows is there's a dispute really about two
22 emissions. PM2.5 on the annual standard and the one hour
23 NO2 standard from the EPA next. This is an excerpt, this is
24 page 37 of the PowerPoint presentation that Mr. Sullivan
25 testified about last summer, Exhibit 95C, and this shows -

1 this is a blowup of the annual average PM2.5 concentrations
2 as measured in micrograms per cubic liter. The orange line
3 that you see here at the top is the EPA annual standard of
4 12 micrograms per cubic meter, and as discussed in the
5 hearing this was drastically reduced recently. It used to
6 be at 15 micrograms per cubic meter a couple years ago.
7 They lowered it to 12 micrograms. The blue line represents
8 the background levels.

9 And so, on this chart it shows that the background
10 levels are around 10.8 micrograms per cubic meter. This is
11 PM2.5 that exists in the ambient air from accumulation of
12 all the activities in society. The red increase is the
13 incremental emissions conservatively modeled that will come
14 from the COSTCO gas station. And, you're saying, well wait,
15 I can't see it. And they're saying, he's trying to pull a
16 fast one. But that's the point. This is a blowup, this is
17 to scale, this is what Mr. Sullivan had in his report. You
18 can't see it unless you come up very close. Because the
19 levels are so small. It's what the EPA considers de
20 minimis. Negligible. Far below the significant impact
21 level. And, as a result, we know that there's not going to
22 be a violation of the PM2.5 standard.

23 The EPA lowered the standard in part because
24 technology is improving. Ambient air levels are improving.
25 All the experts agreed on this, PM2.5 levels are decreasing,

1 and that's what enabled them to lower the standard so that
2 other communities will be in compliance, and now they can
3 hold everyone accountable to a tighter standard. And this
4 is a trend that continues. In fact, this is outdated
5 information. And, as Mr. Sullivan testified, since he
6 prepared this information, the background levels have
7 dropped even further, they're now about 9.8. So, they've
8 dropped a full microgram per cubic meter.

9 So, when you add the anticipated incremental
10 increase with what's there, there's no risk. It doesn't
11 even come close to violating the PM2.5 standard. But you
12 don't have to just take our word for it. You can take Dr.
13 Cole's testimony for it. When pressed, he admitted that
14 PM2.5 is not an issue off the mall property. And this is
15 very interesting and important, because coming into this
16 case, if you go back to read his earlier submissions, PM2.5
17 was the contaminant that he was most concerned about. This
18 is where he really thought the gas station was going to
19 create problems. So the fact that he's backed off that now
20 is remarkable.

21 The other standard is the one hour NO2 standard.
22 And, again, picking up on our conversation a moment ago
23 relating to the commentary in the federal rule, this is a
24 blowup from Mr. Sullivan's February 2014 rebuttal report,
25 this is Exhibit 466. And in this exhibit he shows that the

1 maximum concentrations is going to be 121 micrograms per
2 cubic meter. About 63, 64 percent of the overall standard
3 of 190 micrograms per cubic meter. And it also shows, as
4 all the Isoplex diagrams like this show, that there's a
5 pretty quick drop-off. The highest concentration point is
6 in the gas cube itself. Where, I think it's painfully
7 obvious to everybody that the folks are going to be in this
8 location on no more than a transient basis. This is not
9 where people live, play, etcetera.

10 And so, we've got background levels of 75.5
11 micrograms. We've got a maximum concentration of 121. And
12 even at that 121, it falls off quickly. So, 110 here, 100,
13 95, so there's no real threat to anyone in the residential
14 neighborhood, or in the general neighborhood, or even on the
15 mall property itself. Because even at -- even if you talk
16 about the attendants working at the gas station on long
17 shifts -- they don't live there, but they're there for
18 longer than the average person, it's still far below the EPA
19 max, and it's not going to create any adverse health effects
20 to them. Nor would COSTCO put their employees in danger if
21 it seriously believed that its employees were at risk of
22 adverse health effects from working at the gas station.

23 So, we got here after extensive modeling. Mr.
24 Sullivan testified that this is perhaps the most modeled gas
25 station in the history of the world. He did more modeling,

1 and his company did more modeling on this gas station than
2 on a similar, on another project they did for the City of
3 Baltimore, just the one location. COSTCO and he went above
4 and beyond trying to demonstrate that there will be no
5 adverse health effects. And again, this is -- the air
6 modeling process is very atypical. It's not typically done
7 for small uses like this. It's for big, heavy, pollutant
8 industrial uses. For industries and companies that require
9 an air permit. There's no air permit needed here. But,
10 they went above and beyond, and did this modeling to show
11 that there's no use.

12 In contrast, the opposition has done no air model.
13 Dr. Cole speculates that there might be a violation. Could
14 be a violation, he says. Another time he said, it's
15 distinctly possible. But what is that based on? He did no
16 actual computations. And at one point he said well, I can't
17 do them because it's too expensive. We don't have the
18 resources to do it. But later on cross-examination it came
19 out that we had provided him with the Air Mod software, and
20 we provided them with all the data inputs that Mr. Sullivan
21 relied on. If he disagreed with some of the assumptions, if
22 he thought that we should a different number for mobile 6 or
23 MOVES or if the car levels were different, he could have
24 easily modified them, run the program and come up with a way
25 to support his conclusion. There's no support for his

1 conclusion whatsoever.

2 And, later he admitted he doesn't do air modeling.
3 That's what he said. I don't do air modeling. He's
4 incapable of doing it. If he doesn't actually run the
5 programs -- even if he's right that Mr. Sullivan's
6 assumptions in certain points were incorrect -- how does he
7 know what affect it's going to have on the overall number?
8 There's nothing to support his conclusions. And when you
9 compare Mr. Sullivan's certainty after extensive modeling,
10 testifying with a reasonable degree of scientific certainty
11 that there will be no air emissions, contrasted with Dr.
12 Cole saying, it's possible, it could happen. It's a stark
13 difference.

14 So, let's step back from those two experts, and
15 let's look at what's going on in the real world. This is a
16 chart, Exhibit 466, of NO2 one hour 90 percentile levels,
17 values, from 411 individual monitoring stations across the
18 United States in 2013. This is every monitoring station
19 we're aware of on record measuring one hour NO2 levels. Now
20 this is in parts per billion, not in micrograms per cubic
21 meter, so the standard here, the red line is 100 parts per
22 billion. All of the measured concentrations are below the
23 standard. Sullivan said, has conservatively, highly
24 conservatively modeled stages one and two, came in about 83,
25 85 parts per billion, and that's the highest location found

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1 anywhere in the country. There's one location that came in
2 at 83 parts per billion. His final modeling estimate, his
3 calculation showed stage three is going to be around 64
4 parts per billion. Again, far below the standards that the
5 EPA administrator was talking about.

6 What number does Dr. Cole put on this? He says it
7 might happen. It's distinctly possible. He's way up here.
8 More than doubled Mr. Sullivan's conservatively modeled
9 estimate. How does he get here? We don't know. There's no
10 evidence supporting him. When you look at this compared to
11 what's going on in the real world, his conclusion lacks all
12 credibility.

13 And, for these reasons, we feel strongly, and I
14 know we'll talk about this later but, in terms of the
15 monitoring requirement, we feel that we've met our burden.
16 We've established there's not going to be a violation, and
17 that it would be unfair and perhaps arbitrary to impose that
18 condition on COSTCO. But, we also think that there are
19 complications with it that need to be addressed before that
20 condition is considered further. But, as I said, we'll get
21 into that in more detail later.

22 Turning finally to the oppositions arguments, and
23 again, we've briefed most of these, but I just want to touch
24 upon a few things. COSTCO presented a lot of evidence
25 meeting its burden. And the opposition criticizes that and

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1 attacks them. But it does so with fatally flawed arguments.
2 And, they're fatally flawed for a few reasons. Either they
3 apply the wrong legal standard, they conflate the
4 significance of inherent and non-inherent effects. They're
5 concerns are based on speculation, but have no real proof
6 that something is going to happen, or they focus on
7 inconsequential insignificant events that, when even
8 assembled together, either individually or when assembled
9 together in the aggregate, do not establish a violation of
10 the code or any basis to deny the special exception.

11 A few examples. They continue to insist that the
12 standard is absolute necessity. A standard that almost no
13 special exception applicant could satisfy. That's not the
14 legal standard. It's reasonably convenient for the use of
15 the public. With the sector plan, they keep insisting that
16 we must affirmatively promote all the sector plan goals.
17 That's not the standard. The law requires mere conformity
18 or consistency with the sector plan goals, and COSTCO has
19 gone through in great detail in its briefs about how we not
20 only are consistently conformed with those sector plan
21 goals, but that we actually meet or exceed them in certain
22 situations.

23 Again, they focus on inherent versus non-inherent
24 effects the wrong way. They say the non-inherent location of
25 a gas station on a private ring road mall is an adverse

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1 effect. There are many benefits to having the gas station
2 here, where 4,000 people are going everyday in that precise
3 location. And the estimates are they're going to purchase
4 more than 50 percent of the gas sold at the gas station. It
5 makes sense to put the gas station where the purchasers are.
6 And, they're already coming here.

7 They speculate, they speculate that the gas
8 station is going to drive down property values, but they
9 provide no evidence to support this. And their argument
10 that well, all gas stations drive down property values, even
11 if true, would be an inherent effect. It's not something
12 unique to the gas station. And the physical isolation and
13 the characteristics of COSTCO, and frankly, the popularity
14 of COSTCO gas stations, if anything, could be a boon to real
15 estate values.

16 MR. GROSSMAN: By the way, you have two minutes
17 left.

18 MR. GOECKE: Okay. They also mischaracterize
19 several things such as the new GR zone. They're saying
20 well, the new GR and the zoning rewrite says that you can
21 have residential uses on the mall, but it's not required to
22 put those residential uses there. So, in summary, and I'd
23 like to save one minute, if I could, for rebuttal, we
24 believe we've met our burden. The general conditions, the
25 special conditions, the need conditions. This is a good gas

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1 station. It's going to be safely run. It's going to deliver
2 a need for the people who are already in the general
3 neighborhood, and it's going to be a good use and a good
4 location. This location is not only appropriate, it may be
5 the best location for it, and we would ask that you approve
6 the special exception.

7 MR. GROSSMAN: All right. You'll have one minute
8 and seven seconds left for rebuttal.

9 MR. GOECKE: Thank you. There's no stoppage play
10 extra?

11 MR. GROSSMAN: Pardon me?

12 MR. GOECKE: For the questioning, there's no
13 stoppage time?

14 MR. GROSSMAN: I don't think so. I think 40
15 minutes is enough. All right. I know time flies when
16 you're having a good time. Are you ready, Ms. Rosenfeld?

17 MS. ROSENFELD: Yes, I am. Thank you.

18 MR. GROSSMAN: You may begin.

19 MS. ROSENFELD: I also would like to share in the
20 thanks to you, Mr. Hearing Examiner, and I'll preface by
21 comments by saying that I'm speaking on behalf of Kensington
22 Heights Civic Association and Stop COSTCO Gas, and
23 Kensington View as well. We're submitting a combined
24 closing, oral closing. And, this was a long and often
25 tedious and sometimes testy proceeding, and I do appreciate

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1 your patience over what have been some very long days. And
 2 this could have been a truly unpleasant experience, but your
 3 even tempered approach to witnesses and counsel both has
 4 kept it from being that. And, for that, I thank you on both
 5 behalf of myself, and my clients, and the other opposition
 6 representatives, and thank you.

7 MR. GROSSMAN: All flattery is gladly accepted by
 8 the management. I'll admit that occasionally it got a
 9 little grumpy in the course of this proceeding, but I think,
 10 as I said before, I tried to make sure that both sides knew
 11 that they were being heard, and they were being heard in
 12 this case. You may proceed.

13 MS. ROSENFELD: Thank you. I'd like to start by
 14 just revisiting the burden of proof in this case, and in
 15 this case the applicant has the obligation to prove by a
 16 preponderance of the evidence that it has met all of the
 17 general and special conditions that would be required under
 18 the special exception application. And, it must do so by a
 19 preponderance of the evidence. So, if the evidence is in
 20 equipoise, then the determination should fall on behalf of
 21 the opposition rather than the applicant.

22 And, this is an administrative proceeding, and
 23 there are relaxed standards of evidence. And so, unlike in
 24 many types of court proceedings or trials, there is
 25 discretion for the hearing examiner to consider the weight

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1 of evidence even though it's not expert testimony, even
 2 though it may be hearsay. And, I raise that as a
 3 preliminary matter because much of the -- much of the
 4 argument in the closing and the reply that was provided by
 5 the applicant attacks the evidence and the testimony
 6 presented by the opposition on those grounds. And so, I
 7 just would like to reiterate that you do have flexibility in
 8 how you consider that evidence.

9 I will begin with the question of need, because
 10 whether or not there is a need for this gas station is a
 11 threshold finding under 59-G-1.24 of the zoning code. And
 12 the code requires that the applicant prove by a
 13 preponderance of the evidence that a need exists for the
 14 proposed use to serve the population in the general
 15 neighborhood. Considering the present availability of
 16 identical or similar uses to that neighborhood. Not in that
 17 neighborhood, but available to that neighborhood. And, if
 18 the applicant can't show that there is a need for the
 19 station, then the application must be denied, and the
 20 remaining findings necessary to support approval of the
 21 petition, of course, become moot.

22 You have detailed analysis in the form of written
 23 and verbal testimony regarding Mr. Flynn's need report, and
 24 I'm not going to revisit those materials in this closing.
 25 But there are two overarching considerations with respect to

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1 need that I do want to highlight. The first consideration
 2 is where does the need exist? Is it an identical or a
 3 similar use? Is an identical or a similar use available to
 4 the neighborhood? Mr. Flynn's need study does not make this
 5 finding. His report concludes that, and I'm quoting, "the
 6 proposed automobile filling station, parentheticals,
 7 addresses a need for convenient and useful service that is
 8 not presently available in the area." And this conclusion
 9 sidesteps the finding required by county law, whether the
 10 same service is available to the neighborhood. And, I
 11 reference you to Exhibit 3 at page 32.

12 But the correct legal standard ultimately requires
 13 the Board of Appeals to conduct a broader analysis to
 14 determine whether similar identical use is available to the
 15 neighborhood, regardless of whether or not that use actually
 16 exists within the neighborhood. And COSTCO's own need study
 17 proves that the identical use, a COSTCO gas station, is
 18 available to the Wheaton neighborhood. COSTCO, itself,
 19 estimates that approximately 35 to 40 percent of the gas
 20 sales at the COSTCO Beltsville station would shift to
 21 Wheaton. There was testimony from individuals who live in
 22 Wheaton who say that they routinely go to Beltsville to buy
 23 their gas. Given the fact that the Beltsville station is
 24 available to and heavily used by Wheaton residents, COSTCO
 25 cannot show by a preponderance of the evidence that it meets

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1 the standard for neighborhood need because an existing
 2 COSTCO gas station is available to the Wheaton neighborhood,
 3 and the application should be denied.

4 MR. GROSSMAN: But isn't the logical extension of
 5 that if anybody wants to provide any gas station, you could
 6 always go to another gas station. I mean, wouldn't your,
 7 the logical extension of your argument mean that you could
 8 never find need?

9 MS. ROSENFELD: No. I don't think that's the
 10 case, and that's not the case before us. We're not looking
 11 at any gas station. I think, in particular, the lack of need
 12 is highlighted in the Wheaton area because you have 28
 13 existing gas stations. And the one that they're proposing
 14 to build is the equivalent of, perhaps, eight gas stations.
 15 So, do I think that denying on the basis of need because
 16 it's available to another neighborhood, not necessarily.
 17 This is a unique gas station. People drive out of their way
 18 to get to a COSTCO gas station. It's not your typical local
 19 neighborhood gas station. So, I think we're dealing with
 20 very distinct set of facts in this case.

21 MR. GROSSMAN: Okay.

22 MS. ROSENFELD: The second issue with respect to
 23 need is whether it is an absolute need, or a matter of
 24 public convenience. And, Mr. Goecke urges that it really is
 25 not a question of absolute need. But that is not the law.

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1 That is not the law at this time in Montgomery County.
2 Under the governing county code, and case law, COSTCO must
3 prove by a preponderance of the evidence that there is an
4 actual need for the proposed automobile filling station.
5 Before 2002, the zoning ordinance neighborhood need standard
6 allowed approval if a need existed for "the public
7 convenience and service." In 2002 the Montgomery County
8 Council amended the zoning code, and the County Council
9 deleted the phrase for public convenience and service.
10 The Planning Board had, in fact, recommended that
11 the need requirement be eliminated all together. But that
12 is not what the County Council did. They removed the phrase
13 public convenience and service from the need standard while
14 still maintaining the requirement that there be a finding of
15 need. And what is the legal effect of that amended
16 language? It's not a novel question of law. The Court of
17 Special Appeals answered that question in Brandywine
18 Enterprises, referenced in our materials. And, in that
19 case, Maryland's Court of Special Appeals reviewed a Prince
20 George's County zoning law that required as a predicate to
21 the granting of a particular special exception, that the
22 District Council in that case, find that the proposed use is
23 necessary to serve the projected growth in Prince George's
24 County. And, in that case, the District Council did approve
25 it based on a finding that it was "expedient or reasonable

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1 convenient and useful to the public." And, they did so
2 relying on case law that had interpreted Montgomery County
3 zoning code pre-2002.
4 But the court held that the standard was not
5 convenience or usefulness to the public, because the statute
6 did not define need in those terms. It was a strict
7 statutory construction analysis that the court relied upon
8 in making that finding. And the court instead concluded
9 that the law requires a determination of actual need
10 measured by whether there was a lack of adequate capacity to
11 meet demand. In 2002, the Council removed the terms public
12 convenience and service. It amended the law after the
13 Brandywine case was decided. Under the holding of
14 Brandywine in Montgomery County, need now means that there
15 must be an absolute need for an automobile filling station
16 that is available to the Wheaton neighborhood.
17 Wheaton has the highest concentration of gas
18 stations in the county. There is no evidence in the record
19 whatsoever that Wheaton residents cannot readily purchase
20 gasoline or purchase one from a COSTCO gas station for that
21 matter. There is no evidence at all of queuing in existing
22 gas stations, that there is ever a shortage of gasoline at
23 existing gas stations, or that Wheaton residents are
24 compelled to seek gasoline outside of the neighborhood
25 because gasoline is not available to them.

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1 The applicant's proposal to add this station, the
2 equivalent of approximately eight average gas stations in
3 the neighborhood, that has the highest concentration of gas
4 stations in the county, in no way meets the county's need
5 requirement under the zone. And, I have one final point
6 with respect to need. A COSTCO gas station is a members
7 only station. The only people who can use the station are
8 people who have paid membership dues to COSTCO. The members
9 only component of this station is a non-inherent operational
10 characteristic of the station. How does that fact affect
11 the analysis with respect to need? This also is not a novel
12 question of law. The Court of Appeals has answered this
13 question directly.
14 In Lucky Stores, which was a members only gas
15 station, the applicant in that case argued that its members
16 wanted the station, and that membership interest satisfied
17 the county's need test. The court concluded otherwise, and
18 said --
19 MR. GROSSMAN: Aren't you talking about the MEMCO
20 case, not Lucky Stores?
21 MS. CORDRY: The actual name is Lucky Stores.
22 MR. GROSSMAN: Okay.
23 MS. ROSENFELD: I'll provide you a citation in a
24 moment.
25 MR. GROSSMAN: No, I have the citation.

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1 MS. ROSENFELD: The court said, the need is to
2 serve the membership stores selling policy. It does not
3 establish a need by the population in the general
4 neighborhood. And, that is precisely the position that
5 COSTCO is taking. That its members want the station, so
6 there is a need for it. That membership need does not
7 establish a need by the population in the general
8 neighborhood, and the application must be denied. Moreover,
9 the Lucky Stores case was decided in 1973, well before the
10 2000 amendment removing convenience and service. And so it
11 governs this analysis even under the applicant's reading of
12 the need standard, which relies on the pre-2002
13 interpretation of need.
14 I'd like to turn now to a discussion of the mall
15 parcel itself. Because there has been a great deal of
16 discussion about, legitimate discussion about health and
17 safety welfare of the people who live in the adjoining
18 neighborhood, and I know you know this, but I'll say it for
19 the record, just because I'm focusing on these points in
20 oral argument doesn't mean I'm stepping away from anything
21 that we have in our written closing submission, which goes
22 through a number of issues that I won't touch on this
23 afternoon.
24 MR. GROSSMAN: It's very extensive.
25 MS. ROSENFELD: 59-G-1.21(a)(4) of the zoning code

1 requires that the special exception will be in harmony with
2 the general character of the neighborhood considering "the
3 intensity and character of activity, traffic and parking
4 conditions." Now, the neighborhood in this case has been
5 defined to include the mall parcel as well as a certain
6 perimeter surrounding residential homes. I will point out
7 that when the application was filed, the applicant argued
8 that the neighborhood was limited to the mall parcel itself.
9 So, since the first day that this application was filed, all
10 of the general and special conditions that have to be met to
11 approve this special exception have to be met within the
12 mall parcel, as well as now with the broader definition of
13 neighborhood, the adjoining properties.

14 The proposed gas station does not and cannot
15 satisfy this standard for numerous reasons. And, I'll
16 remind you again, we're talking about now the intensity and
17 character of activity, traffic and parking conditions.
18 First, the zoning code provides that the non-inherent
19 adverse effects of the special exception can be created by
20 unusual characteristics of the site itself. In this case,
21 the site is a very busy regional mall parking lot. It is a
22 non-inherent characteristic. Moreover, the site, the
23 special exception site itself, immediately abuts the four
24 bay warehouse loading dock for the COSTCO warehouse itself.
25 MR. GROSSMAN: What's the exhibit number that

1 you're pointing to?
2 MS. ROSENFELD: This is Exhibit No. 232A. And,
3 there are some stunning operational conflicts that arise
4 from the location of this special exception use at this
5 location. Let me start with this one. The fueling bays for
6 the gas station itself are located here on the western side
7 of the special exception lease. This is the truck turning
8 radius for a tanker truck that is coming in to deliver fuel
9 to the gas station. It necessarily comes in from the west,
10 drives north, and then parks at the fueling station and then
11 continues to travel north and then travels west -- I
12 apologize, it comes in from the west and heads east, and
13 leaves going west.

14 There's the much-vaunted pedestrian pathway here,
15 north of the special exception itself. This striped
16 pathway. He may say that there are raised islands here to
17 demarcate between the two way east/west drive aisle north at
18 the special exception. What happens when this tanker truck
19 leaves the gas station? It has to drive over the island
20 that had originally been there, pedestrian safety, an area
21 where pedestrians could stand safely. This island has been
22 removed because the tanker truck has to swing out over this
23 pedestrian walking aisle. So, some pedestrian who believes
24 that they're standing here in a safe area turns around and
25 suddenly the rear of the truck is driving over this safety

1 island. It's a conflict. It's a conflict between the
2 pedestrian and the truck use. And Mr. Duke testified that
3 that island would be removed specifically to allow that
4 turning radius. I'd like to continue with the phrase with
5 other truck turning radiuses exhibit, and this is Exhibit
6 No. 232B, the first was 232A. Let's take a look at what's
7 going on here.

8 These are semi tractor trailers. Tractor trailers
9 that need to access the loading docks to provide supplies to
10 the COSTCO warehouse. And there are two in particular that
11 I'd like to focus on. The first is space number 1N and the
12 second is space number 4N. How do these tractor trailers
13 access the loading dock? And there are many, many, many
14 deliveries in any given day. They drive from west to east
15 on the outer roadway from the ring road. They have to stop
16 in front of the sole entrance to the gas station and wait
17 for any oncoming traffic that may be approaching to make a
18 left-hand turn into the northbound island in order to access
19 the loading dock. This northbound isle is a two way
20 roadway. Traffic can drive north/south, or south/north.
21 So, the tractor trailer needs to stop in the ring road, or
22 perhaps it can just travel on, travels up here and it needs
23 to back into this loading dock. What else is going on here?
24 You have two way traffic, you have parking spaces, and you
25 have people who would presumably, if they're going to make a

1 right-hand turn, could wind up behind this tractor trailer
2 thinking it's going to be driving through to some other part
3 of the mall, and suddenly realize they're right behind a
4 tractor trailer that's trying to back up. So then what do
5 they do?

6 We are talking about a very, very busy parking
7 lot. You heard testimony from people who support the COSTCO
8 application who told you how busy and congested this parking
9 lot is. Mr. Duke testified that there were perhaps as few
10 as six inches of clearance between -- for the turning radius
11 between the outer perimeter of the tires and this island.
12 We saw pictures giving evidence of the fact that these
13 existing islands in fact where often rutted because tractor
14 trailers had missed the mark and driven through here. You
15 have the same scenario whether the tractor trailer is trying
16 to enter space 1, which is the southernmost bay, or space 4,
17 which is the northernmost bay.

18 And, at the same time, you have people who will be
19 parking along the ring road and/or walking on the pedestrian
20 path who will naturally be trying to take the shortest
21 walking distance to the entrance of the mall which is just
22 over here. The confluence of pedestrians, tractor trailers,
23 parking lot, two-way traffic, is mind boggling. Mind
24 boggling. How can this possibly be safe? How can it
25 possibly be an acceptable level of intensity, given

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1 character of the activity, the traffic and the parking
2 conditions here? They are putting too much in too small of
3 an area.

4 And, my final point on this topic, and I refer you
5 to Exhibit 231, this is the red line special exception, and
6 you may recall early in the case we talked about the fact
7 that the easternmost side of the special exception has an
8 island at the south, it has a curb leading toward the north,
9 and then there was this striping in an opening that would
10 allow for tractor trailers or anybody else, frankly, to
11 access directly the special exception, and perhaps the
12 tractor trailer to back into the queuing lines, or that
13 people might try and cut into the special exception gas
14 stations queues, people looking to get, to purchase gas.

15 So, the applicant decided to try and remedy that
16 conflict by adding either bollards or chains. Where did
17 they put those bollards or chains? They put them as far
18 interior, to the interior curb lines as they could. They
19 need every inch, every inch of maneuvering room they can
20 find. It's just a further example that underscores how
21 tight this thing is. It is unsafe. It is simply unsafe
22 given the conflicts. Under even the best conditions, the
23 County Executive has officially determined that parking lots
24 are dangerous places for people. When people get hit in a
25 parking lot, they suffer far more severe injuries than they

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1 would otherwise. Probably because they're not in a car, or
2 are more likely to be killed than if they're involved in a
3 vehicle accident elsewhere.

4 So, we heard testimony from Mr. Guckert on this
5 point. What was his answer? Are parking lots safe? Are
6 these pedestrian/vehicle conflicts a problem? And, his
7 answer was, a parking lot is a parking lot. And that is
8 precisely our point. That is precisely our point. This is
9 a parking lot. It's a busy parking lot. It's a congested
10 parking lot. You've heard that from both the opposition as
11 well as people who've come in to testify in support. And,
12 adding, it's not just a question of adding additional
13 vehicles. It's a question of how this use is -- I want to
14 say the word crammed into -- is, that's it, that's what it
15 is -- into this space. There simply is not enough room.
16 There's not enough room for the tanker trucks. There's not
17 enough room for the loading docks. And there's not enough
18 room for people to maneuver safely, particularly, in that
19 corridor.

20 You asked during the hearing on March 11th, the
21 transcript reads 128, whether or not there is an additional
22 danger to pedestrians from cars using the gas station as
23 distinguished from cars using the parking lot. If they're
24 relatively the same number. And, I'm quoting what you said.
25 And my response is this, this assumption doesn't hold. They

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1 are not relatively the same end number. The gas station
2 will create far, far more vehicles in this area than that
3 area would generate if it were simply a parking lot. So the
4 two really are not comparisons. The intensity generated by
5 this use geometrically exceeds what it would be as a parking
6 lot standing alone. And that conflict is compounded by the
7 fact that you have the surrounding highly incompatible very
8 intense traffic uses right abutting that gas station area.

9 The other point I'd like to make with respect to
10 pedestrian safety, this is Mr. Guckert, Exhibit No. 128, and
11 he sort of highlights traffic and pedestrian counts, where
12 he thinks people are going to be. And, I'd like to just
13 kind of survey quickly where he found pedestrians would be
14 walking or not walking. So, without going through all of
15 these, pedestrian count from 5:00 p.m. to 6:00 p.m. going
16 into and out of the mall along the sidewalk, the front
17 sidewalk in front of the Target, 839 people going into the
18 mall, 789 people leaving the mall. Eight hour pedestrian
19 count, 4,757 people going into the mall, 838 people leaving
20 the mall.

21 Okay, so these are people walking, going this way
22 into and out of the mall. So, how are these people getting
23 there? Well, let's see. We have this intersection here
24 marked No. 3, pedestrian count. Eight hours, four people
25 and 15 people. Pedestrian count over here, No. 4, the

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1 parking lot access along the ring road, pedestrian count,
2 total of six. A total of six people. The ring road, the
3 southern boundary of the ring road, how many people,
4 pedestrian count, one. Eight hour pedestrian count
5 combined, he's got three people going south, 17 going east,
6 and 12 going west. And then, along the parking lot access
7 just to the east of the safety, pedestrian count, zero
8 people going south, 14 going east, and 11 going west. The
9 numbers are similar throughout the mall.

10 So, if you have almost 5,000 people going into and
11 out of the mall, and you have, I'm going to guesstimate
12 fewer than 100 crossing at signalized places along the mall,
13 how are those people getting there? They're walking.
14 They're walking all through the parking lot. That's what
15 they do. Like Mr. Guckert said, it's a parking lot. That's
16 where they walk. And, what does this special exception
17 propose to do, it proposes to bring substantial numbers of
18 additional traffic in a confined space. Like I said, the
19 surrounding uses are simply not compatible with the number
20 of pedestrians that you have on the mall site.

21 I also would like to talk for a moment about home
22 values. The special exception requires that there be a
23 finding that the proposed special exception will not be
24 detrimental to the economic value of surrounding properties.
25 And in voir dire I asked Mr. Cronyn, the applicant's expert

1 on property values, if he had qualified before the Board of
2 Appeals previously on valuation. And, on page 24 of the
3 transcript Mr. Cronyn responded and I quote, "I'm not an
4 appraiser. I don't testify on valuation."

5 MR. GROSSMAN: And, what's the date of that
6 transcript, just so, since you cited to it?

7 MS. ROSENFELD: I'm afraid I don't have that date
8 with me, but I will send it to you. It's page 24 of the
9 date that he testified.

10 MR. GROSSMAN: Right.

11 MS. ROSENFELD: I don't testify on valuation.

12 So, Mr. Cronyn himself confirms that his testimony did not
13 go to the economic value of surrounding properties. So what
14 did he do? He looked in at a neighborhood with existing gas
15 stations and determined that over the course of a decade or
16 so those homes appreciated. And he also determined that
17 over the course of a decade or so, the homes in the
18 Kensington Heights neighborhood appreciated. And he
19 concluded, based on that analysis, that introducing a new
20 mega gas station into Kensington Heights would not affect
21 property values. "I can't conceive that there's going to be
22 any negative impact on the appreciation of the properties
23 that are in the Kensington Heights proximate blocks." And
24 that's at page 239. He looked at appreciation, not value.

25 Not only did he fail to assess value, as is

1 required by the statute, but by his own admission, he could
2 not support his conclusion with respect to appreciation. As
3 you pointed out, Mr. Grossman, the evidence during the
4 course of the hearing date, the evidence on page 10 of Mr.
5 Cronyn's report documents that since 2010 the price of
6 housing next to the gas station on Connecticut Avenue is
7 comparable, rose appreciatively while the housing prices in
8 the comparison Kensington neighborhood did not. And in
9 response to cross-examination, Mr. Cronyn said that he could
10 not rule out the possibility that the announcement of the
11 gas station, which occurred in 2010, caused that
12 differential. And, he concluded, could it be a factor? It
13 could be a factor. And that's pages 265 to 267.

14 The applicant failed both with respect to the
15 burden of proof. There is no evidence at all on value.
16 And, with respect to the burden of persuasion. Mr. Cronyn,
17 himself, even using his own analysis, could not say that the
18 mere specter of the gas station did not cause the slower
19 appreciation rates in Kensington Heights. It gets worse.
20 What Mr. Cronyn failed to evaluate was whether introducing a
21 new mega gas station into an established neighborhood only
22 118 feet from the closest property would have a negative
23 effect on the current value of those homes. Would the
24 presence of the gas station be a material consideration to a
25 prospective purchaser? Sure. Mr. Cronyn, himself,

1 testified that he would be obligated to disclose the gas
2 station to a long distance purchaser. Page 265. He
3 testified that some purchasers simply would not buy a home
4 next to a gas station. And finally, the home sales that he
5 evaluated along Connecticut Avenue were home sales that
6 occurred after gas stations were in existence. When asked
7 if he evaluated before and after scenario, when where a new
8 gas station is introduced into an existing neighborhood to
9 determine if the new gas station would have an effect on the
10 sales prices of existing homes. He said, I didn't try to
11 make an evaluation that way. Page 269.

12 Even though the opposition doesn't have the burden
13 of proof, under the relaxed evidentiary standards governing
14 administrative proceedings, the hearing examiner has
15 latitude to determine what constitutes credible evidence.
16 And I submit that there is in the record credible evidence
17 in the form of studies that show that there can be an
18 affirmative decrease in the value of homes proximate to gas
19 stations. On that point, we submit that they failed to
20 provide any evidence, let alone credible evidence.

21 I also would like to address briefly some of the
22 health issues that Mr. Goecke raised. And I'd like to start
23 out by the reports that were provided on health. And, when
24 Mr. Sullivan introduced his first report in November of
25 2012, I believe it was, he provided a report -- frankly, it

1 was the report that was reviewed by the Planning Report, who
2 said that there would be no adverse health effects based on
3 clear compliance with the NAAQS, national Ambient Air
4 Quality Standards. And, in fact, he testified that he could
5 double the NO2 number and still be well low within range.
6 As it turns out that wasn't in fact the case.

7 And so, he provided another report. And he
8 provided that report in August 2013. And that was supposed
9 to be his final report. And, he concluded that under his
10 analysis in that case, which stepped back significantly from
11 the conservatism that he said he had in his first report
12 that everything would be hunky-dory. And then, Dr. Cole
13 testified. And, in response to Dr. Cole's testimony,
14 evidently the applicant became very concerned that they had
15 not met their burden of proof, and they came forward with
16 yet another report, the rebuttal report.

17 For the record, we continue to maintain that
18 report doesn't satisfy the evidentiary standards under
19 Maryland law, and should not be accepted because it's not
20 premised on scientifically accepted methodology. It should
21 be stricken from the record. However, even if accepted,
22 basic reality is that Mr. Sullivan has stepped back and back
23 and back from the conservatism in his original reports.
24 Each time his conclusions were challenged, he revised his
25 base assumptions in order to derive a report that would fall

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1 within the National Ambient Air Quality Standards, and given
2 that pattern, that pattern of stepping back from
3 conservative analysis and conservative assumptions alone
4 raises significant credibility issues with respect to his
5 report. Dr. Cole testified that the methodology used in his
6 final report, Mr. Sullivan's final report, was not any
7 methodology accepted or recognized by the EPA. It was a new
8 methodology created by Mr. Sullivan for this case.
9 MR. GROSSMAN: You're talking about the stage 3?
10 MS. ROSENFELD: The stage 3. We have extensively
11 evaluated that report in the record, and I'm not going to go
12 through it. The other point that I'd like to make in
13 response to Mr. Goecke is that he asserted that the PM2.5
14 standard was reduced from 15 to 12 because the background
15 levels were dropping. That's not the case. It was reduced
16 from 15 to 12 because the EPA found that at 15 there were
17 adverse health effects. And so, adverse health effects are
18 the issue that the hearing examiner needs to consider. The
19 applicant, with respect to health effects, is understandably
20 focused on the properties beyond them mall parcel.
21 The quotation that you read earlier from the EPA
22 administrator, we provided to you, we agree with the reading
23 that you had questioned Mr. Goecke on, and we think that
24 that is the proper application. That, when you look at the
25 neighborhood beyond the mall parcel that, in fact, the

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1 levels do need to be significantly lower. But the applicant
2 has conveniently overlooked the impact of these pollutants
3 on the people in the mall parcel itself. They are the
4 workers. They are the residents. They are the visitors to
5 that parcel. The people in that queue are in the hot spot.
6 The people in that queue, as testified by the community when
7 they came in to speak, included people with asthma, with
8 cardiology problems, with other lung issues. It included
9 some of the most sensitive populations. They need to be
10 protected. They need to be protected under these standards
11 as much as the people who live next door will be next to the
12 special exception for 24/7.
13 And, I would be remiss if I didn't point out, or
14 remind you about the concerns about the medically fragile
15 children at the Stephen Knolls School. They are a
16 consideration. And, to the extent that the air quality
17 standards beyond the mall parcel fall within those lower
18 parameters established by the EPA, beyond the monitoring
19 areas, they also are at risk, and they need to be protected.
20 MR. GROSSMAN: I have one brief question for you
21 about the monitor, choice of monitors. It was argued by Ms.
22 Cordry in the course of the hearing that the BAM monitor
23 should have been counted and used, and I asked if Dr. Cole
24 was going to testify about that. I don't recall Dr. Cole
25 ever testifying that the BAM monitor should have been

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1 counted in. Is the opposition now abandoning that argument
2 that the BAM monitor should have been counted? Because Dr.
3 Cole did not address it as far as I can recall.
4 MS. CORDRY: It is in his original comments on the
5 protocol. The original draft protocol versus the revised
6 protocol. He was arguing for the use of that higher
7 monitor. I don't know that he addressed it again in his
8 testimony.
9 MR. GROSSMAN: Did not address it in his
10 testimony?
11 MS. CORDRY: I don't think so. But it is in his
12 comments on the report, in the original report.
13 MR. GROSSMAN: I did ask that he address it.
14 MS. CORDRY: I'm not positive. We'd have to look
15 back and see that for sure.
16 MS. ROSENFELD: And, my --
17 MR. GROSSMAN: By the way, you're down to one
18 minute and 16 seconds.
19 MS. ROSENFELD: I appreciate Mr. Goecke's comments
20 about the civility of this process. There are comments in
21 the written record that give me great pause, however, and
22 I'd like to address them just briefly. In their reply they
23 say that the opposition relies heavily on erroneous legal
24 standards and speculative conjecture. And, I can't leave
25 that unaddressed. To the extent that the applicant's

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1 comments raise the implication that I or my clients have put
2 forward unfounded legal or factual grounds for denial, I do
3 not appreciate the suggestion. We've introduced exhaustive
4 factual information, detailed cross-examination, and
5 provided significant volumes of legal analysis. Beyond my
6 noting my frustration with the tone of these comments, I
7 will let the record speak for itself on this issue because I
8 think it speaks eloquently in our favor.
9 Finally, the Kensington Heights Civic Association,
10 joined by the Stop COSTCO Gas Coalition, and the Kensington
11 View organization, have spent countless hours -- with your
12 indulgence, if I may finish my sentence.
13 MR. GROSSMAN: Finish your sentence, certainly.
14 MS. ROSENFELD: They have never been secretive
15 about their opposition to this use at this location. And
16 they stand in very good company, because the Montgomery
17 County Planning Board likewise recommended denial of this
18 application, and I am very proud to stand here with them and
19 request that you as well recommend denial. Thank you.
20 MR. GROSSMAN: You're welcome. All right,
21 applicant, you have, I think I said one minute and seven
22 seconds. You may begin.
23 MR. GOECKE: Thank you. The opposition has worked
24 very hard on this case, and they should be commented for
25 this volunteer effort that they've put in, and our arguments

1 are not a personal attack on Ms. Rosenfeld. We simply
2 believe that they're wrong. And once again, she's still
3 insisting upon the wrong legal standard when it comes to
4 need. Since the code has changed, the courts have not
5 addressed it, but the Walter Johnson did, and that
6 reinforced the earlier Lucky Stores application and held
7 that there is no absolute necessity standard. The
8 Brandywine case enforced a PG County code. That's
9 distinguishable. It was a totally different code, and it
10 doesn't apply here. And apparently, PG County disagrees
11 with Ms. Rosenfeld because COSTCO's opened three gas
12 stations in Prince George's County. So the fact that that
13 standard is supposed to be used here to deny this station
14 makes no sense.

15 And again, we're still hearing the speculation.
16 We've heard 10 minutes about the truck turning radiuses, and
17 changes that are going to be made. The trucks are getting
18 to the warehouse just fine now. Yes, the barrier is going
19 to be further away now. In the future, if the gas station
20 is here, it's going to improve the situation. She talks
21 about the hazards of trucks going through the station --

22 MR. GROSSMAN: You may finish your sentence too.

23 MR. GOECKE: And, but we're only talking about two
24 to four trucks that are going there each day, and there's no
25 evidence that they're going to cause any damages. As Dr.

1 Adelman said when he observed the traffic at the site, it's
2 so dangerous, I was surprised there weren't more accidents.
3 I guess it's because people drive slower. People are going
4 to accommodate this.

5 MR. GROSSMAN: Okay. All right. Thank you both
6 for your excellent closing arguments. And now, let's turn
7 to the question of the conditions that are under
8 consideration. And, let's deal with the list that I
9 provided, and first of all address what Ms. Kamen and
10 technical staff said. She noted that in condition 2(f),
11 which I suggested, I had used the word acoustical screening,
12 and she said it's not an acoustical wall unless it's changed
13 in some way. And I would agree with that. I think
14 everybody can agree. I should substitute the word, a
15 screening wall, rather than an acoustical wall. We all
16 agree on that?

17 MS. CORDRY: So the assumption is that the wall
18 will not in fact have any particular sound barrier effects?

19 MR. GROSSMAN: I'm not making any assumptions.
20 I'm just saying that technical staff says it shouldn't be
21 characterized as an acoustical wall. And, I think we can
22 all agree to calling it a screening wall instead.

23 MS. ROSENFELD: That's acceptable.

24 MR. BRANN: Agreed.

25 MR. GROSSMAN: All right. Then on condition 19,

1 Renee has concerns about the way it was phrased it implied
2 that there was going to be a path from Mount McComas,
3 whereas the changes by the Planning Board and the
4 preliminary plan and site plan for that property, that
5 preliminary plan no. 120110170 made that much more iffy, and
6 so, I'd suggest changing the language I have here, the
7 second sentence in possible condition 19 as, the east end of
8 the wall shall be located so as to provide pedestrian access
9 to a possible path extending from the property at 2609
10 McComas Avenue (Mount McComas) which property, and I add the
11 word property, is being developed under preliminary plan.
12 That, I think, makes it clear that we're not talking about a
13 path that must be there.

14 MS. CORDRY: Just to let you know, Ms. Rosenfeld
15 stepped out to get a paper. We're okay to go forward
16 without her being present.

17 MS. ADELMAN: And, Mr. Rosen, I'd like to note
18 that I have a printout of your conditions, and it does not
19 have no. 19. It goes from 18 to 20.

20 MR. GROSSMAN: I don't know what you're looking at
21 because I'm looking at it in front of me and it's got 18,
22 19, 20.

23 MS. ADELMAN: SNAFU someplace.

24 MS. CORDRY: Oh no, no, I think I sent -- no. I
25 think those are the agreed upon conditions.

1 MR. GROSSMAN: Yes, there was -- the agreed upon
2 conditions that the opposition, or at least Kensington
3 Heights, I should say, Kensington Heights Civic Association,
4 and COSTCO had a set of agreed upon conditions, they were
5 missing a number. But, in the conditions that I sent, I
6 renumbered things and changed the order somewhat to be
7 logical the way I considered logical. So, they're don't
8 correspond exactly.

9 MS. ADELMAN: Thank you.

10 MR. GROSSMAN: Then, on condition 21, Ms. Kamen
11 notes that Maryland National Capital Park and Planning
12 Commission does not approve nor have review authority
13 regarding landscaping on stormwater management ponds. So, I
14 would change, I would take out the language that says M-
15 NCPPC and put in DEP instead, which is the agency that would
16 have jurisdiction there. Is that all agreeable?

17 MS. ROSENFELD: DEP?

18 MR. GROSSMAN: Yes, DEP, which is what Ms. Kamen
19 said. And, on condition 23 concerns the question as far as
20 conservation plan. I took that language from the agreed
21 upon conditions, but it is true as Ms. Kamen points out,
22 that there was an exemption granted regarding this site in
23 terms of a forest conservation plan. So, I think she's
24 correct and perhaps, so what we should do is say, take out
25 the reference there to forest conservation plan and say

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1 petitioner must not violate the terms of any stormwater
2 management plan approved by the County Department of
3 Permitting Services which was another condition that was
4 agreed upon. But, I don't think we can reference a forest
5 conservation plan that doesn't exist for the site. All
6 right. So, I think that handles the -- agreed on that --
7 that handles the commentary from Ms. Kamen that's in the
8 record.
9 All right, so now let's turn to the applicant and,
10 did you have any comments you wish to make about the set of
11 possible conditions that I outlined in Exhibit 632?
12 MS. HARRIS: Yes. There were six conditions that
13 we had comment about. I'm going to -- I want to reserve one
14 for the end because that's going to require the most
15 extensive discussion, I believe. But I'll start with
16 condition no. 4, which are the hours of operation.
17 MR. GROSSMAN: Right.
18 MS. HARRIS: The applicant had proposed a start of
19 6:00 in the morning and there was no -- it's our position
20 that there's no evidence in the record to suggest that
21 there's any adverse affect at all that will be created from
22 starting gas station operations around 6:00. We know that
23 activity on the mall starts earlier than that. There was no
24 indication, I mean, there's a low level of volume at that
25 hour. That's no noise associated with commencing the gas

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1 station operations at 6:00 in the morning. You know,
2 there's the loading activity at the mall at the COSTCO
3 begins at 4:00 in the morning, and there's other uses on the
4 mall that actually start at 6:00, some earlier than 6:00.
5 And so, we were puzzled by the recommendation.
6 MR. GROSSMAN: Right. I changed that. I tinkered
7 with the hours in response to testimony from citizens
8 including Mr. Core and others about noise issues. And it
9 also affects potentially when the first truck arrives to
10 deliver fuel and so on. So, that was my rationale there.
11 But, let's here from the opposition on this point.
12 MS. CORDRY: I mean, we appreciate any time if it
13 starts later than it does. The quiet hours, you know, it's
14 already very noisy at that time period from the warehouse
15 operating, which it's one of the things where it goes back
16 and forth, the warehouse is totally separate when it's a
17 matter that it causes problems and it's kind of beneficial
18 when it's one of the reasons why they come to the store but,
19 you know, it is a time period where it would be very quiet
20 back there except for these kind of operations and anything
21 we add to that, you know, wakes people up. If you can give
22 people another half hour of sleep they'd really appreciate
23 it in the morning, I'm sure.
24 MR. GROSSMAN: Well, I think the point the
25 applicant is making is that it's already noisy there and

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1 it's not going to -- there's no evidence that it will add to
2 the noise of that, and maybe it wouldn't be giving people
3 another half hour of sleep. So, was my change, my change in
4 the possible condition improvident is what she's saying,
5 based on the evidence in the record.
6 MS. CORDRY: Well, it's also difficult to believe,
7 you now, that the small number of people that they say will
8 be coming to the gas -- you know, it's one of those things
9 that cuts both ways. It's a small number of people coming to
10 the gas station, but if it's a small number, you know, does
11 it make any real difference whether you, you know, take 10
12 people and tell them come after 6:30 or something like that.
13 Whatever the number is. I mean, I'm not sure we really know
14 for sure exactly.
15 MR. GROSSMAN: All right. So, I hear you on that
16 and you'd like 6:00 a.m. to 9:30 p.m.?
17 MS. HARRIS: Correct.
18 MR. GROSSMAN: All right. I will consider that.
19 And the Saturday and Sunday hours of 7:00 to 7:00, you
20 didn't have an objection?
21 MS. HARRIS: We don't have an objection.
22 MR. GROSSMAN: Okay. All right, what's your next
23 point?
24 MS. HARRIS: The next one, but I want to skip and
25 come back to it is condition no. 6.

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1 MR. GROSSMAN: Okay.
2 MS. HARRIS: And, actually 7, because there's a
3 provision that go hand and hand.
4 MR. GROSSMAN: Yes.
5 MS. HARRIS: On condition no. 13, I wanted to
6 request clarification. The condition says no more than five
7 fuel deliveries, and then it says to coincide with the
8 retail store operations. I wasn't sure what you were getting
9 at on that.
10 MR. GROSSMAN: I think I got that language from
11 agreed upon condition. Let me see.
12 MS. CORDRY: I think the agreed condition is no.
13 11 which only has the -- scheduling one of daily gas
14 deliveries prior to 9:30 a.m.
15 MR. GROSSMAN: Then maybe I pulled it from
16 something else. Well, I don't have --
17 MR. HARRIS: Mr. Grossman, perhaps it was a
18 thought that the deliveries had to coincide with when the
19 gas station was open?
20 MR. GROSSMAN: I mean, I think that was the
21 concept, but I'm not wedded to that language. I think that
22 it's --
23 MS. HARRIS: I mean, because it said retail store
24 operations, I read that to mean you were referring to the
25 warehouse. I mean, I wasn't really sure actually what you

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1 were referring to.
2 MR. GROSSMAN: Okay. So, maybe we should strike
3 that language and if there's no issue with the -- appears
4 from the opposition so --
5 MS. CORDRY: The part that to coincide with the
6 retail store operations, that's all right.
7 MR. GROSSMAN: So, no more than five fuel
8 deliveries will occur per day including weekends. Okay?
9 MS. HARRIS: Okay. Then on condition no. 22
10 having to do with what activity can occur within the Forest
11 Glen Buffer. We may need, and this is going to dovetail
12 back to condition no. 6, we may need to add another
13 provision that says, except for the monitoring device that
14 may be added. And, I say that to some extent because at
15 least, we were under the misperception that a monitoring
16 device was a pole with a mechanism hung on top of it. And,
17 in fact, that's not the case it all. It turns out it's a
18 mammoth structure. It looks like the size of a garden shed.
19 And, to the extent it needs to be placed somewhere, there
20 may be interference in the Forest Buffer temporarily. And I
21 recognize that that could fall under any activity required
22 by applicable law, rule or regulation, but I want to make
23 sure that in addressing one issue we're not creating
24 another.
25 MR. GROSSMAN: And, I should say, I guess we

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1 should add too, if I didn't have it in the provision
2 regarding monitoring, that location of any monitoring device
3 that is on property not belonging to the petitioner must be
4 with consent of the property owner.
5 MR. SILVERMAN: I'm not understanding. Is the
6 idea that the shed would be in the forest buffer?
7 MS. HARRIS: Well, we're going to get to that when
8 we discuss no. 6, which is one of the issues. We also
9 recognized the point that you just made as well, which if it
10 goes on elsewhere, is somewhat outside the scope of the
11 special exception, we can't control a private entity in
12 terms of --
13 MR. GROSSMAN: Right. It would have to be -- if
14 the Board imposes a condition on the petitioner which
15 involves some other entity's property, then there would have
16 to be with permission of that other entity.
17 MR. SILVERMAN: And, how would that permission be
18 given? What would be the expression of it, or when would we
19 know it was given?
20 MR. GROSSMAN: Well, that would be part of what
21 the process would be. That is, the condition would be set
22 up so that it is with the consent of the property owner, if
23 the property owner, for example, if there's monitoring on a
24 residential property it would have to be with the
25 residential owner. So the Board of Appeals would, as part

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1 of its condition say, you know, with consent given by the
2 owner within 30 days or whatever it is.
3 MR. SILVERMAN: And, if the consent is not given?
4 MR. GROSSMAN: If it's not given that it would not
5 be -- then the requirement would not exist at that location,
6 because we can't require something to happen on somebody
7 else's property that is not before the -- as you pointed out
8 in your own filing.
9 MR. SILVERMAN: Yes, indeed.
10 MR. GROSSMAN: But the requirements in general,
11 the main part of your concern is handled by the fact that
12 the obligations are on the petitioner, and so if the
13 petitioner doesn't comply then it's the petitioner's problem
14 for most of them. I think that with the location of a
15 monitoring device, that's a little bit different and it
16 would have to be with the consent -- which we don't have
17 consent right now because it hasn't been something that had
18 been part of the process before.
19 MR. SILVERMAN: So, if the consent is not given
20 the condition goes away, or the project goes away?
21 MR. GROSSMAN: Right, the condition as I would
22 rephrase would have a line that would say, with the consent
23 of the property owner, and as determined by a filing within
24 30 days or whatever. We'd have to have some language that
25 would clarify that.

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1 MR. CORDRY: I think what he's trying to get at
2 is, assume you had, let's simplify it for a moment and say
3 you just had one monitoring station and we were going to put
4 it on Westfield property. If Westfield said no, don't put
5 it here, does that mean that we don't have a monitoring
6 requirement anymore, or does it mean we don't have the
7 special exception approved? In other words, does the
8 applicant --
9 MR. GROSSMAN: I'll answer the question. The
10 answer is not that you wouldn't have a special exception
11 unless the Board decided that, and once again, these are
12 possible conditions that the Board may or may not agree to,
13 but presumably it would be that if a property owner decided
14 that it couldn't be on its location -- now Westfield I
15 consider in a different category -- but, if it were the
16 school, for example, if the Montgomery County Public Schools
17 said there could not be a monitoring station on Stephen
18 Knolls property, then there would be no monitoring station
19 there. That condition would go away.
20 MS. CORDRY: You mean, just be forfeiting
21 essentially the right to have the monitoring done if you
22 don't agree to have the station on your property?
23 MR. GROSSMAN: Right. That's the way I conceived
24 it. Okay.
25 MS. HARRIS: Should I proceed?

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1 MR. GROSSMAN: Yes.
2 MS. HARRIS: Okay, then the final one before I
3 return to no. 6 and 7, is no. 27. And, I think this is
4 somewhat implicit, but I request that there be clarifying
5 language.
6 MR. GROSSMAN: Okay.
7 MS. HARRIS: The last sentence which says,
8 petitioner shall maintain a list of all reports of problems
9 or complaints. I would add the language that petitioner is
10 made aware of.
11 MR. GROSSMAN: Okay. I can say submitted to the
12 station contact. Okay.
13 MS. HARRIS: Then returning to condition no. --
14 MR. GROSSMAN: I take it nobody objects to that,
15 okay.
16 MS. HARRIS: Then, returning to condition no. 6.
17 I first want to echo or refer back to Mr. Goecke's testimony
18 and reiterate COSTCO's position that we do not think that
19 monitoring is necessary for all the reasons that have been
20 set forth both in our brief and that you heard during the
21 oral argument. To the extent a condition is going to be
22 required, we have looked at your recommended language and
23 have further revised it. And, if we could, we drafted
24 something.
25 MR. GROSSMAN: Okay.

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1 MS. HARRIS: And, I would suggest either for me to
2 first summarize what this says, and then people read it or
3 we can do it the other way around.
4 MR. GROSSMAN: Well, why don't you hand out copies
5 and then you can summarize it as well. And, I'll actually
6 mark it as an exhibit.
7 MS. CORDRY: Considering we've been going this
8 long and this is a little bit to read, could I suggest a
9 five minute break?
10 MR. GROSSMAN: Sure.
11 MS. CORDRY: That will let us all get this read.
12 (Exhibit No. 635 was marked for
13 identification.)
14 MR. GROSSMAN: Let me say since we have a 633 and
15 a 634, this will be Exhibit 635, and I'll say it's COSTCO's
16 proposed modification of possible condition no. 6. And,
17 we'll take a break until 11:35.
18 (Whereupon, a brief recess was taken.)
19 MR. GROSSMAN: All right. Now, did you want to
20 summarize something before we let the opposition comment?
21 MS. HARRIS: Yes. A couple of things, and I think
22 it's helpful to first start by noting sort of the three
23 major points I want to make. One is the unprecedented
24 component of imposing a monitoring requirement.
25 MR. GROSSMAN: Hold on one second. Excuse me.

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1 We've started the session again, so, thank you very much.
2 MS. HARRIS: Should I start again?
3 MR. GROSSMAN: Yes.
4 MS. HARRIS: Okay, so I do, I will summarize, but
5 I want to make three, a couple points that provides the
6 framework. One has to do with the unprecedented situation
7 of even imposing a monitoring requirement on a use such as
8 this. The second one has to do with the recommended 6
9 million gallon limit in the first year, which I believe, and
10 I'll explain, is actually counterproductive to what I
11 believe you're objectives are, and then, third is the need
12 to impose certainty into the requirement, and that means
13 imposing a NAAQS standard, that compliance with the NAAQ
14 standard.
15 As I noted before the break, the record is clear
16 that there's no violations of the NAAQS standard, and that's
17 why we think that the monitoring is not necessary. It's
18 highly unusual to require monitoring, and in fact, Mr.
19 Sullivan testified to that fact, his conversations with MDE
20 noted that in the state of Maryland where you have things
21 like coal power plants, steel plants, quarries, no industry,
22 no company is required to monitor their activities. The
23 isolated -- and no for that matter are the eight other
24 COSTCO gas stations throughout the state of Maryland or any
25 other competitors that also have high volume gas stations.

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1 The one example that Mr. Sullivan noted numerous times was
2 lead smelters, and this is not a lead smelter, so I want to
3 make that really clear.
4 In terms of the 6 million gallon cap that was in
5 the proposal that you noted, it seems like that actually
6 would yield a counterproductive result. It would not
7 provide an accurate reading of what the emissions of the gas
8 station will be once it is up and running and in full force.
9 And so, what we've try to do in our condition is build in
10 sort of a stage level of thresholds and safeguards, meaning
11 you can't get to the next step unless you prove in the
12 initial six months that you've satisfied the levels. And I
13 think, and I'll explain a little bit more, but I think that
14 does, that accomplishes the goal. And then, the final note,
15 and then I'll summarize the condition, is again, we've spent
16 36 hearings. No one wants to repeat this process. We don't
17 want Mr. Sullivan to have to spend eight more days on the
18 stand or however many it was, and so for that reason, there
19 needs to be a clearer standard. That was said over and over
20 again throughout the hearing. That it would be arbitrary
21 and capricious not to have a standard out there to hold the
22 applicant to. And, short of any other standard, the NAAQS
23 standard is the appropriate one.
24 MR. GROSSMAN: I noticed three things. One is
25 that you don't mention PM2.5 in the monitoring. You don't

1 mention the school and the pool either.
 2 MS. HARRIS: In terms of PM2.5, I think that one
 3 exhibit that Mr. Goecke showed speaks for itself, as well as
 4 Dr. Cole's testimony. There is no justification to monitor
 5 that tiny little sliver knowing also that in the last year,
 6 the levels of PM2.5 have gone down, and all indications are
 7 they're going to continue to go down. So it seems totally
 8 unnecessary.

9 MR. GROSSMAN: And what about the question of
 10 monitors at the school and the pool?

11 MS. HARRIS: We do mention that or we do insert
 12 that under a contingency, but let me just say, our thought
 13 of approaching this was pick one monitoring site which will
 14 yield the highest levels. If you pick that one site that's
 15 the highest levels, then there's no need to then pick two
 16 other sites. And, I think, as I said earlier, when we first
 17 commented on the issue of monitoring, there is, I believe, a
 18 little bit of misconception of what's involved. They're big
 19 structures. There's a cost associated with it, and that
 20 cost, while not three times, if you provide three, is a
 21 significant increase from just providing one. And, in fact,
 22 the issue with PM2.5 as well, it's not that you take the
 23 same monitor and then put another switch on there, it's a
 24 whole different mechanism. So, it can increase the cost by
 25 \$60,000 to add a PM2.5 monitor. But, what we have said is,

1 after that first year, if we're not 75 percent of the NAAQS
 2 level, so the 98 percentile of NO2 is not lower than 75
 3 percent of the NAAQS, then we will add in the two other
 4 monitoring sites. So then we will for the second year
 5 monitor all three sites. That's in paragraph, the third
 6 paragraph on the first page. Like four lies down.

7 MR. GROSSMAN: Oh, I see, okay.

8 MS. HARRIS: So, if I could just very quickly sort
 9 of walk through out thinking which was, we need to have a
 10 baseline. Six months will provide -- a minimum of six
 11 months provides the baseline. It would be in a location
 12 that we believe is, will yield a high level. And, I think
 13 this is important too, and I believe, and actually the
 14 opposition in their initial condition alluded to this or
 15 had a reference to this type of setup, there would be an
 16 independent validating company that would read the outputs
 17 and confirm yes, this is what they say.

18 So that would go on for six months to get the
 19 baseline before the station ever became operational. Then,
 20 starting upon operation, they would need to continue that
 21 monitoring protocol for a period of six months, they would
 22 need to submit the results, they would need to be validated.
 23 If they are under the NAAQS, they would need to -- so that's
 24 your first check in, and again why we don't think the 6
 25 million gallons is necessary -- they'd operate for six

1 months. Assume for a moment they do, as they expect, which
 2 was, as we said, 10 to a maximum of 12, that would give the
 3 6 million gallons for the six months, and that gives you the
 4 read, the test of what that actually will yield. Then they
 5 continue it for the second six months. If they're under,
 6 and if they're under by 75, as I said, if the 98th
 7 percentile of NO2 is less than 75 percent of the NAAQS, then
 8 they can cease the monitoring requirement. If their under
 9 the NAAQS but above the 75 percent, then they need to bring
 10 in the other two monitoring sites. So, at the school and at
 11 the pool, assuming and we sort of have the same concern
 12 about how would we locate on those properties, but assuming
 13 we can make an arrangement with those entities, then we
 14 would monitor for a second year.

15 And, if after the second year, if we are below, if
 16 COSTCO is below the NAAQS, then the monitoring will cease.
 17 If they're not, that's a different story and the Board of
 18 Appeals then has jurisdiction to decide what to do. But we
 19 would want to know because, you know, there could be a lot
 20 of construction activity going on the site, the Mount
 21 McComas site or whatever, that one of the reasons for the
 22 Board of Appeals to hold a hearing is to determine what the
 23 cause of the exceedance may have been. It may not even be
 24 attributable to COSTCO. It could have been that there was a
 25 lot of construction activity going on for three months that

1 had nothing to do with the COSTCO gas station.

2 MR. GROSSMAN: Yeah, I do have a concern about some
 3 of the self-executing termination clauses you have here.
 4 Rather than it being the result of the Board actually making
 5 a determination. So you have if the 98th percentile
 6 concentration for one hour NO2 is less than the NAAQS,
 7 petitioner may continue operations and shall continue to
 8 monitor as outlined above. But then you have if it's less
 9 than -- at the end of the paragraph, if it's less than 98th
 10 percentile and one hour NO2 is less than 75 percent of the
 11 NAAQS, COSTCO may cease monitoring and the Board of Appeals
 12 shall issue a resolution so indicating.

13 I have a problem with that kind of self-executing
 14 language. And, we would, obviously, have to add something
 15 in a couple of places of with the permission of the property
 16 owner in terms of siting a monitor. All right, let me hear
 17 from the opposition.

18 MS. ROSENFELD: First of all, the location of the
 19 monitoring monitor itself really shouldn't be at -- the only
 20 location shouldn't be at the property line. That may be an
 21 appropriate additional location, but the proper place for
 22 the monitoring site itself is within the special exception
 23 boundaries. For the very reasons that we've said all along,
 24 under the EPA standards which say you measure at the source,
 25 and then if you're below the standards at the source then

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1 your presumption is that you are within acceptable
2 parameters as you get more distance from the source. The
3 other reason why it's important to have that monitoring
4 location within the special exception area is because the
5 special exception area includes visitors and workers, and
6 those people, just like the residents, are entitled to
7 protection under the NAAQS. And so, that's the appropriate
8 place to --
9 MR. GROSSMAN: So, you don't think you need to
10 have at the residents or at the school or at the pool, just
11 at the --
12 MS. ROSENFELD: I'm not necessarily saying that,
13 particularly if there are exceedances that are shown. But,
14 without question, absolutely you need to have one at the
15 source itself.
16 MR. GROSSMAN: But if, you say if exceedances are
17 shown, so if we didn't -- we could eliminate the issue of
18 the property owners, I guess, if we had monitoring at the
19 site, it would eliminate the issue of property owner
20 consent, if we have monitoring at the site, I guess that
21 would handle that issue, and then if there are exceedances
22 and you wanted additional monitoring, I guess you could
23 petition the Board of Appeals, if they were to impose these
24 conditions.
25 MS. CORDRY: I mean, we're sort of are just seeing

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1 this for the first time, but if we are talking about only
2 one spot, for the moment, for the sake of discussion, that
3 would seem to be the spot and then I think a different
4 question is, whether the initial monitoring, more
5 monitoring, needs more spaces or not but, I do understand
6 the point that normally you don't have a whole lot of these
7 stations in a very concentrated area.
8 MR. GROSSMAN: Right. What do you think about
9 that suggestion, Ms. Harris?
10 MS. HARRIS: A couple things. One is, there's
11 simple a logistical problem. As I said, it's the size of a
12 large shed. So, I don't know how you would actually put it
13 at the station, you know, within the special exception site
14 itself. I think that could be difficult. The other thing
15 is, you know, it's a different, no one lives, works and
16 plays as Mr. Goecke said, at the gas station. That's a
17 transient population. Someone's there 10 minutes. The
18 NAAQS levels that may occur there, though still well under
19 the standard, are different than at the school, pool and
20 property and residences which, for the last year and a half,
21 I had understood that to be the problem.
22 MS. CORDRY: But again, we go back to the point
23 which you read into the record, that it is the point at the
24 area wide highest concentration that that level is being
25 measured at. Most of the time the EPA was talking about in

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1 the middle of a road. Here we're talking about this being
2 the highest source of the pollution, so it really is not the
3 question of what it is hundreds of feet away from the
4 pollution source.
5 MR. GROSSMAN: But, how do we deal with the -- I
6 hear you, but how do we deal with the logistical problem
7 that they raise. If it's the size of a shed, I guess it
8 would have to be outside the immediate gas station site, and
9 put on Westfield property.
10 MS. CORDRY: Well, either that or they can
11 redesign one of their landscaping islands, or they slightly
12 shorten off their kiosk. I mean, I don't believe that it's
13 an insurmountable problem to be able to find a space in a
14 parking lot that size to put this piece.
15 MS. ROSENFELD: And, I also want to respond to the
16 notion that everybody there is transient. Clearly, they're
17 going to be people working in the vicinity. We heard
18 testimony from Mr. Sullivan, I believe, that said that the
19 ambient air levels within the surrounding buildings would
20 likely match what was the ambient air outdoors. And there
21 also was testimony that there are people who would be
22 sitting and eating lunch or otherwise spending time outside.
23 MR. GROSSMAN: Well, I understand that. I don't
24 think you have to argue about it. I'm just right now
25 concerned with the logistical issue of placing it. We'd

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1 need permission from Westfield to place it in the parking
2 lot outside of the gas station perimeter. And I don't think
3 that it makes sense to tell them to redesign the gas station
4 at this point after the hearing is completed. What about
5 that getting permission from, something from Westfield
6 agreeing to locating a monitoring site at least for a year,
7 possibly up to two, but on the parking lot adjacent to the
8 subject site?
9 MS. HARRIS: I can't speak for them. I can say
10 they've clearly demonstrated that they're a partner in this
11 application. If Erich could, if you have any insights.
12 MR. BRANN: If that's what we're required to do,
13 they won't object to it.
14 MS. CORDRY: Yeah. I think the other possibility
15 is you may be able to build it on top of the kiosk because
16 oftentimes these things are elevated.
17 MR. BRANN: That would violate testing norm
18 according to Mr. Sullivan. There's certain height
19 restrictions. That it has to be at a certain height.
20 There's a whole list of things that have to be met.
21 MR. GROSSMAN: All right. Well then, I think that
22 it would make sense to ask that we get a letter from
23 Westfield saying that they would permit a monitoring site on
24 the parking lot adjacent to the subject site if required by
25 the Board of Appeals as a condition of the special

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1 exception. And, I think that would eliminate the other
2 issues of the property owners. And, I think it does make
3 sense to locate it on the site.
4 MS. HARRIS: And then I think that that really
5 then reemphasizes my other point to you which is, if you're
6 measuring on the site, you certainly don't need to go
7 further away to measure.
8 MR. GROSSMAN: What do you mean?
9 MS. HARRIS: That only one monitoring site is
10 necessary.
11 MR. GROSSMAN: Yes, yes. No, I'd agree. At that
12 point, and I think that point has been made actually by Ms.
13 Rosenfeld, that you don't need to have the other sites,
14 you'd only need the one monitoring site.
15 MR. SILVERMAN: Do you know that?
16 MR. GROSSMAN: But, I think it would have to
17 include the PM2.5 as well as the NO2. And, I don't know,
18 you have included here monitoring NOXNO as well. If you're
19 monitoring NO2 which is what we're concerned about really,
20 why is it necessary to monitor the NO and NOX?
21 MS. HARRIS: As you know the NOX and the NO are
22 the good components, but to some extent it was because it
23 then allows COSTCO to have the information that came up
24 numerous times in this hearing about conversion rates of NO
25 to NO2, and so that they --

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1 MR. GROSSMAN: I don't have a problem with you
2 doing it, I'm just saying, in other words if it were a
3 condition I don't have a basis for requiring --
4 MS. HARRIS: And, in fact, maybe we take the NO
5 and NOX out, but know that when they want the printout --
6 MR. GROSSMAN: You can do it. I mean there's
7 nothing that prevents you from monitoring.
8 MS. CORDRY: And if we could along that point, I
9 believe the way the monitors work is they kind of do a
10 continuous thing and you get information from them both
11 about the one hour amounts, and the annual amounts. I don't
12 think, and maybe Mr. Sullivan can give us that information,
13 I don't think the kind of normal monitoring you would do
14 would be incompatible with also knowing annual levels. So,
15 we would certainly be looking at both of those. At this
16 point it looks like it's lower than the annual, but things
17 could change. And, going to the PM2.5, we would agree that
18 we think it needs to be there. One of the points I would
19 make is that chart he showed you was from the first analysis
20 of PM2.5. When they went to their stage 3, the numbers on
21 PM2.5 changed dramatically, and there was in fact, would be
22 a very visible red bar if he uses stage 3. So, he's got to
23 be consistent. If he's going to use stage 3, he can't be
24 using analyses that went back to his first version of the
25 analysis. So we would think that the PM2.5 should be

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1 monitored as well. And again, I believe the numbers are
2 there. That the 24 hours and the annual numbers are just a
3 way of, you calculate the annual average from the 24 hour
4 numbers, but we think we should have the information so we
5 can determine compliance with basically there's two
6 standards, two for NO2 and two for PM2.5.
7 MR. GROSSMAN: Yeah, as far as the NO2, I'm not
8 sure there's a record basis for requiring monitoring of
9 annual No2.
10 MS. CORDRY: I think it's -- and again, perhaps
11 Mr. Sullivan can clarify.
12 MR. GROSSMAN: But it may be easy to calculate,
13 but I'm not sure there's a record basis as there may be a
14 record basis for one hour NO2, at least it was the more
15 significant issue. On the PM2.5 I put in annual in my
16 language. Is that the most appropriate measure of the PM2.5
17 in terms of the issues in this case? The annual?
18 MS. CORDRY: Again, it's the one where we're
19 closest to the standard on, I believe. But again, I believe
20 the annual is simply calculated from the 24 hour numbers
21 that they come up with.
22 MR. GROSSMAN: Let me hear from the applicant.
23 MS. HARRIS: I'm sorry, too many conversations.
24 MR. GROSSMAN: My question was, I had put in,
25 based on my recollection of the record, annual PM2.5 as one

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1 of the things to be measured, and so I just asked the
2 question does everybody agree that that is the, was the
3 issue in terms of PM2.5 was the annual as opposed to the 24
4 hour?
5 MR. GOECKE: If I could just respond. At this
6 location, we think there's absolutely no basis for the PM2.5
7 because no one lives there. This is measuring annual
8 exposures and no one is going to be there for, you know,
9 over the duration of a year like that. And, if I just may,
10 while we're trying to have a productive conversation about
11 what the monitoring requirements might look like, our
12 official position is to object to the monitoring at all. So
13 for appellate purposes, I want to make clear that we do
14 oppose that. But, in terms of what makes the most sense and
15 try to address the concerns that you may have, you know, we
16 don't -- if you're going to force PM2.5, yes, the annual
17 standard is the one that should be measured against. But, in
18 addition to our other objections, we think this location
19 isn't appropriate for PM2.5.
20 MR. GROSSMAN: Do we know the answer to the
21 question posed by Ms. Cordry which is, whether or not the
22 annual measurements are just a derivation of the 24 hour
23 measurements?
24 MS. HARRIS: If we could, our expert, if you would
25 like to hear from Mr. Sullivan, that might short circuit

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1 some of the conversation.
2 MR. GROSSMAN: All right, Mr. Sullivan?
3 MR. SULLIVAN: Ms. Cordry is correct. When you're
4 collecting, you know NO2 data, it's determined on a one hour
5 basis. All that data is logged into the computer, and so
6 the computer software will compute the annual average
7 concentration, as well as any percentile. So, it's part of
8 the system.
9 MR. GROSSMAN: How about for the PM2.5?
10 MR. SULLIVAN: PM2.5, if that was required, we
11 would use EPA's gold standard reference method, which is a
12 24 hours composite sample. Those would be compiled, you
13 know, every six days on EPA's schedule, and those would be
14 used to compute 24 hour compliance as well as annual
15 averages.
16 MR. GROSSMAN: Okay. All right, so there's no
17 additional monitoring required to get both figures as I
18 understand it. So there's no reason not to have both
19 figures here. Both the 24 hour and the annual for PM2.5,
20 and both the one hour NO2 and the annual NO2 because it's
21 just a calculation from the same results you get from --
22 from the same data you collect. Okay.
23 MR. SILVERMAN: Mr. Grossman?
24 MR. GROSSMAN: Yes, sir.
25 MR. SILVERMAN: Just a couple points.

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1 MR. GROSSMAN: Yes, sir.
2 MR. SILVERMAN: I'm really not sure the record
3 supports any of this. I feel like we're kind of sorcerers
4 or apprentices here inventing things. I would just recall
5 to you one of the studies from Las Vegas where the writer
6 says, we don't understand why we got these measurements
7 because they may have been the wall, we don't really
8 understand. So, the idea that we're going to sit here in a
9 kind of quasi-judicial forum without a lot of testimony, and
10 some studies, and come up with the best place to put the
11 monitor, I think is a little problematic. Secondly, --
12 MR. GROSSMAN: So you don't want any monitoring?
13 MR. SILVERMAN: No, I do want monitoring. I think
14 it's right. The question is how do you get it done, and how
15 do you get it done the right way. In fact, the monitoring
16 is the only, it's really the only accountability in terms of
17 air pollution and health that we have. There's no other
18 accountability mechanisms.
19 MR. GROSSMAN: Well, we don't have a perfect
20 world, but this is what we can come up based on this record.
21 MR. SILVERMAN: Well, there was testimony from Mr.
22 Sullivan, and Dr. Cole agreed that to do monitoring you need
23 a baseline of two years. I don't know where this six months
24 comes from because, especially in this region of the world
25 where we have very distinct seasons and very radical

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1 differences in air pollution levels during different
2 periods. So, I mean, and Dr. Cole said well one year would
3 also get you something good, as I recall. So, I think with
4 that suggests to me is that anything you do should be at
5 least one year and probably two years, and certainly not six
6 months.
7 MR. GROSSMAN: Well, the advantage to the six
8 month period is if the values are very high in the
9 monitoring, the Board of Appeals, you can petition the Board
10 of Appeals, they can step in and maybe operations could be
11 halted. But you apparently don't want that.
12 MS. CORDRY: Well, I think there's two different
13 questions here. One is, if we get numbers as we're going
14 along, we can obviously always step in regardless of what
15 their is. But, I think the point and, we were going to make
16 it as well, is that there are, the levels of ozone, the
17 levels of NO2 and so forth, there are very distinct seasonal
18 variations of those generally, and then, of course, the mall
19 itself has very distinct seasonal variations of traffic
20 patterns and congestion and so forth. So any six month
21 period is not going to pick up the entire pattern of what's
22 there. I think, in general, one of the EPA requirements is
23 at least two or three years. I understand that that's
24 probably, would be beyond what you would be willing to
25 recommend, but we do think to get a real baseline, you would

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1 need to for a year to pick up the entire scope of what might
2 occur on the mall parcel.
3 MS. HARRIS: I think though the issue here isn't -
4 - the ultimate issue is whether after the gas station is
5 built whether the NAAQS is exceeded. So, if you have
6 baseline of six months and that provides a baseline, not
7 background information, but a baseline, then the real issue
8 is, what happens when the gas station's operational. And
9 there we are giving a whole year to make that determination.
10 There's no need to go back further in establishing the
11 baseline.
12 MR. SILVERMAN: Well, you don't establish a
13 baseline with six months. I mean, they could have been
14 monitoring all this time, and I think if the proper way to
15 establish a baseline is one or two years, I think that's how
16 you should do it. I would also like to suggest a change in
17 the very first words that petition must be conduct
18 monitoring. I'd like to suggest petitioner must finance a
19 monitoring program done by the state or a reputable
20 scientific agency, rather than have them do it. I think
21 that would be a much more credible --
22 MR. GROSSMAN: Well, first of all, the Board of
23 Appeals cannot require the state to do something.
24 MR. SILVERMAN: Well, they can require, you could
25 require the petitioner to make grants to willing parties,

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1 capable parties to do monitoring.
2 MS. HARRIS: That's why we recommended the
3 validating company, an independent third party to address
4 that issue.
5 MR. SILVERMAN: And who is that?
6 MS. HARRIS: It can be the monitor, the company
7 that provides the monitor, they have such services. It
8 could be, there may be other services that do it, and Mr.
9 Sullivan can probably shed light on this. It could even be
10 MDE if they wanted to dip their toe in this, but I don't
11 think they do.
12 MR. GROSSMAN: Anything else, Mr. Silverman?
13 MR. SILVERMAN: Yeah. Will this -- I take it the
14 validating company would not be Sullivan Environmental, is
15 that right?
16 MS. HARRIS: The validating company?
17 MR. SILVERMAN: Yeah.
18 MS. HARRIS: No. That was exactly to address the
19 concern.
20 MR. SILVERMAN: Thank you. And in terms of, I
21 mean, if you're actually doing -- also, there was a
22 statement Ms. Harris made about no, that Mr. Sullivan heard
23 from somebody in MDE that there's no plant does monitoring.
24 I think that is a double hearsay, and the only reason I
25 raise it, because I don't believe it's true from my

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1 experience. But my statement is worth as much as that, we
2 don't know what people do. It was never discussed in the
3 testimony really.
4 MS. HARRIS: If I could correct. I mean,
5 actually, Mr. Sullivan testified to that on the hearing and,
6 if my recollection is correct, then Mr. Grossman said to Dr.
7 Cole and the Coalition, if you think otherwise, inquire
8 yourselves at MDE. There's no counter information to that
9 fact.
10 MR. GROSSMAN: Yeah, I mean, but it really is
11 somewhat immaterial here because if I think that the record
12 would demand that monitoring be required, then I would
13 recommend it whether or not there's another company that
14 does it.
15 MR. SILVERMAN: I'd also like to suggest addition
16 to PM2.5 that we monitor ozone, O3. I mean, there's a great
17 deal of testimony of the connection between ozone and NO2.
18 And, it may be that the -- I don't know that the maximum
19 levels of NO2 would be right at the gas station or 20 feet
20 away, or 30 feet away. I don't really know. I don't think
21 anybody knows.
22 MR. GROSSMAN: Well, I'm not going to be able to
23 handle every possible contingency. I don't see a
24 requirement of requiring them to measure ozone as well, nor
25 do I think that it should be required that they measure NO

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1 or NOX in general. But they can, if they think that it will
2 be helpful.
3 MR. SILVERMAN: You know, if someone was trying to
4 set up a truthful monitor to validate or to amend modeling,
5 I think they would conduct a small study initially as to
6 where to put the monitor. And some of some of the factors
7 that might influence the location of the monitor. And,
8 we're kind of -- we don't have a record for that. I mean, I
9 do think monitoring should be done. I think it's a great
10 idea, I believe we've wanted that all along. We've been
11 wanting that from the beginning, but I think it's - all this
12 is a little offhanded and makes me wonder whether we're
13 going to come up with accurate results. I notice the
14 validating company doesn't have anything to do with where
15 you put the monitors and so forth. And, that's one of the
16 most important decisions you can make. And, in my
17 experience, you spent a lot of time sort of scoping that out
18 then you know the rest of your investigation is really
19 worthwhile.
20 MR. GROSSMAN: You want to respond to that, Ms.
21 Harris?
22 MS. HARRIS: I have a couple of responses. But
23 before I get to that, the one point I wanted to make is, in
24 our initial condition where we said that if we're not, if
25 we're less than 75 percent below, that provision was under

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1 the assumption that we wouldn't be modeling on site, we'd be
2 modeling further away. Now that we're modeling on the site,
3 I don't think that's necessary because obviously, we're
4 measuring at the place where it's going to be the highest.
5 And so as long as we are below the max, that should be the
6 controlling factor.
7 MR. SILVERMAN: I would like to remind the --
8 MR. GROSSMAN: Well, are you responding to that
9 comment, the 75 percent comment?
10 MR. SILVERMAN: Yes, I am. The legal standard,
11 and I think I put a memo in, and nobody argued with it, is
12 cause or contribute to a violation of the NAAQS. Now, Ms.
13 Harris just indicated well, there's going to be
14 construction, there probably will be violation of the NAAQS.
15 But the question is, will you cause or contribute to
16 essentially a health problem. And I think, since the
17 standard, the legal standard is cause or contribute to a
18 violation of NAAQS, and I think that the 75 percent has
19 merit wherever you do it.
20 MR. GROSSMAN: Well, that's not really the legal
21 standard here, as I think I pointed out during the oral
22 argument. The legal standard here is affecting the health,
23 adverse health effects. But, did anybody else want to say
24 anything about the 75 percent? I mean, I think there is a
25 point to be made there by Ms. Harris, that is that, if you

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1 actually are monitoring at the site in effect roadside, then
2 the reason for the 75 percent does seem to disappear.
3 MS. CORDRY: I'd like to comment after just a
4 moment, but we had a couple of other points to make. One is
5 that this apparently is saying that you wouldn't get any
6 reports until after the full six months of monitoring. We
7 think reports could be provided either monthly or quarterly
8 so it doesn't go on for so --
9 MR. GROSSMAN: Well, I saw that in the original
10 things that you submitted. I think that's unnecessary.
11 MR. CORDRY: Well, I think yours suggest
12 quarterly.
13 MR. GROSSMAN: So, I considered everybody's
14 submissions in coming up with these conditions.
15 MS. CORDRY: Yours was suggesting quarterly.
16 MR. GROSSMAN: Pardon me?
17 MS. CORDRY: Yours was suggesting quarterly
18 reports.
19 MR. GROSSMAN: Okay.
20 MS. CORDRY: So we would --
21 MR. GROSSMAN: No, but you had said monthly.
22 MS. CORDRY: Well, either monthly or quarterly.
23 Certainly not six months.
24 MR. GROSSMAN: Okay.
25 MS. CORDRY: And, the other piece was, we

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1 certainly another part we want to make sure we keep in mind
2 here is that the NO2 standard, in particular, is well in the
3 middle or being re--evaluated, so that when we talk about
4 applicable standards, it should be clear the applicable
5 standards, including any that may change during the time.
6 I'm not sure exactly when they expect that to come out,
7 sometime in the next two years probably or so, to move
8 slowly. I think the every five years is more in the breach
9 then the actual correction, but it certainly may very well,
10 from the evidence we put in, suggest that there's a strong
11 possibility that it may decrease during this time. So, we
12 want to be sure that the standard will be whatever the
13 standard is as we go along.
14 MR. GROSSMAN: Ms. Rosenfeld, did you have
15 anything else to add to that?
16 MS. ROSENFELD: No, I concur with Ms. Cordry.
17 MS. CORDRY: So, the idea is if -- but we're also
18 looking at your point that any -- that essentially this is
19 to come back and have a -- ask to have it taken out of the
20 monitoring program at that point, not an automatic, that
21 there's no further discussion if it was below a particular
22 level or something like that. In other words, you were
23 saying that these would not be automatic things, that they
24 essentially would come back to the Board of Appeals, and
25 they would say, look, we're below the NAAQS, and that should

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1 be enough, you should let us out, ad we say, yeah, you're
2 one tenth of one percent below the NAAQS, you should --
3 MR. GROSSMAN: Right, I didn't want it to be self-
4 executing in that sense. Did you have something else to
5 say, Mr. Silverman?
6 MR. SILVERMAN: Yes, with regard to cause or
7 contribute. The last sentence that -- if you exceed
8 something the Board of Appeals will hold an emergency
9 hearing within 10 days to determine the cause of the
10 exceedance, and to identify the appropriate action. I mean,
11 again, it's the EPA standard which I think is also a common
12 sense standard is, is whether or not the gas station is
13 causing or contributing to the exceedance.
14 MS. ROSENFELD: And, I'd like to add to that.
15 That clause gives me concern as well. And having just seen
16 it, I'm not quite sure at the moment how to address it, but
17 to hold an emergency hearing within 10 days to determine the
18 cause of the exceedance, I can see that being an eight day
19 hearing in and of itself with competing experts just like we
20 had here trying to determine what the cause is and may be.
21 MR. GROSSMAN: Well, I don't think she meant to
22 say that the hearing itself would have to be, happen within
23 the 10 days, but it would -- well, I guess it does say would
24 hold an emergency hearing within 10 days. All right. So we
25 can think over that language.

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1 MS. CORDRY: So, if the other question on the 75th
2 percentile, I mean, that's the trigger if we're having a
3 second year of monitoring, correct, and that's the question
4 is whether that, if it's in that range should there still be
5 a second year or monitoring. I mean, in once sense I think
6 it is fair to still ask for the second year because, as we
7 say, the baseline on these things is normally a three year
8 limit when they do look at actual monitoring as a basis for
9 this, I believe it normally expects three years, so this
10 would be in one way, a way of pulling -- I think we could
11 probably because if we have it at the highest spot, I think
12 we could probably forego putting the other two monitors in.
13 But, I think there's much to be said for keeping the full
14 three year period which really is the period in which
15 actually these one hour concentrations are usually looked at
16 over a three year period.
17 MR. GROSSMAN: I mean, I think there are other
18 reasons in general for three year periods in monitoring for
19 whole background things as opposed to looking at a specific
20 site and saying -- and there is an expense involved. So,
21 I'm concerned about going overboard in what I might
22 recommend to the Board of Appeals in this in terms of
23 length. I think that you could probably get a pretty fair
24 idea over this period of time.
25 MS. ROSENFELD: But, I'd like to reinforce what

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1 Ms. Cordry just said and for this reason, if this really
2 were an EPA permit process, there would be a review period.
3 The EPA would look at the permit periodically and determine
4 what the actual emissions are. We don't have that here.
5 And so, as a precautionary measure to have that baseline
6 three years up front, I think, is not unreasonable given the
7 fact that the applicant itself has said that it expects the
8 gas station to be there for 20, 30, 40 years.
9 MR. GROSSMAN: Well, the reason why you don't have
10 that EPA review is probably because the EPA doesn't consider
11 this kind of activity one that is likely to require that
12 kind of individual attention. Was there anything else that
13 you all wanted to say?
14 MS. HARRIS: Just one more point.
15 MR. GOECKE: Kind of in response to some of the
16 arguments being made. I think this underscores for us why
17 we prefer the self-executing mechanism. I understand that
18 you would prefer to have the Board of Appeals hold a
19 hearing, but these types of arguments underscore why it's so
20 critical that we have a structure and a criteria at those
21 hearings that are clear now. Such as, so long as the
22 monitoring results are below the NAAQS, and that have been
23 verified by this independent party, that the Board of
24 Appeals then should or you would recommend, or however you
25 want to word it, to cease monitoring. We're going to loose

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1 the benefit of these 36, now 37 hearing days, and all of the
2 evidence that's been presented to you, and all of your
3 careful thought and consideration in being able to respond
4 to these arguments. If Mr. Silverman gets up and says,
5 well, there's construction, as he just casually did and
6 concluded that it's going to be a violation, there's been
7 absolutely not evidence for that. But if he comes before
8 the Board of Appeals and makes comments like that, and Ms.
9 Cordry starts arguing, well, typically with three years, you
10 need three years of background, they're not going to know
11 the benefit. And, if we don't have clear instructions on
12 how that hearing is going to go, we're going to end up back
13 before you, as Ms. Rosenfeld predicts, an eight day hearing
14 or longer.
15 MR. GROSSMAN: Maybe I will have retired by then.
16 MS. ADELMAN: You're retiring in about three hours.
17 MR. GROSSMAN: My second retirement.
18 MR. GOECKE: So, we have concerns. We have
19 concerns about going down that road.
20 MR. GROSSMAN: I hear you. Yeah, I'm going to
21 take all of this into consideration in framing this, whether
22 or not it's part of my recommendation or part of an
23 appendix, I am going to take everybody's comments into
24 consideration. I would like to get something from
25 Westfield. Let's see, it's the 19th today, so let's say 10

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1 days. We'll keep the record open both to get the transcript
2 here, and to get a letter from Westfield until the 29th of
3 September.
4 MS. CORDRY: Would it be possible, we have not
5 presented this, obviously, to Dr. Cole, or anybody else. I
6 don't know that there's anything more we would have to say,
7 but if we had anything after giving it to him, that we would
8 put it in in that same 10-day period if there was anything
9 else?
10 MS. ROSENFELD: For example, modifications to the
11 condition that we would recommend.
12 MR. GROSSMAN: Okay, I think that's fair. So, why
13 don't we say to submit it, today's the 19th, by the 24th,
14 and then we'll give the applicant until the 29th to file any
15 response to any written comment that you have.
16 MS. HARRIS: So, just to be clear, Cole's, your
17 response after you let Mr. Cole review --
18 MS. ROSENFELD: After Dr. Cole has a chance to
19 review this.
20 MS. HARRIS: And then, this is a statement
21 probably of the obvious but, to the extent the monitor is
22 somewhere on the parking lot site, it may take up two
23 spaces.
24 MR. GROSSMAN: A couple of parking spaces, yes, I
25 understand. They're willing to sacrifice probably. And, I

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1 have to say that Mr. Silverman, I'm not punishing you, but
2 you can't get anymore chicken livers because they changed
3 the cafeteria downstairs. So, no more chicken livers for
4 you.
5 MR. SILVERMAN: The information generated by the
6 monitors, would that be published on the internet? Would
7 that be available to NIH, or available to Department of
8 Environment, or other?
9 MR. GROSSMAN: I think we said it was going to be
10 supplied to the Board of Appeals, MDE, Technical Staff, and
11 the opposition groups.
12 MR. SILVERMAN: Could it also be published online?
13 MR. GROSSMAN: Is there a reason in particular to
14 publish it online?
15 MR. SILVERMAN: Yes, because the whole --
16 MR. GROSSMAN: It'll be public. I mean, you would
17 be able to -- it wouldn't be secret, and you could put it
18 online if you wanted to. I mean, I'm not sure -- does that
19 have an advantage.
20 MR. SILVERMAN: So we would get it, so we could
21 put it online. Okay, all right, fine.
22 MR. GROSSMAN: It's not private.
23 MS. HARRIS: We're going to provide them reports.
24 They can do what they want.
25 MR. GROSSMAN: Right. We're all on the record,

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1 and it's all public.
2 MS. ADELMAN: So, Attachment A is out of the
3 picture, right?
4 MS. HARRIS: Yes. We did make copies of it.
5 MR. GROSSMAN: That was in terms of locating?
6 MS. HARRIS: Right. That was when we were talking
7 about the residential property line.
8 MR. GROSSMAN: I think that the sense of this
9 conversation is both from the perspective of the opposition,
10 it makes sense to monitor on the site, and from the sense of
11 the -- from the standpoint of the applicant if you want to
12 apply a direct, specific NAAQS standard at the roadway, as
13 they like to say in all these discussions in the federal
14 register. Then, you get the clearest application of the
15 direct standard without worrying about the reduction that
16 one would expect as it goes further away from the source.
17 So, I think that makes sense from everybody's standpoint.
18 I'm glad we had this discussion. All right.
19 MS. CORDRY: We had a couple of other fairly minor
20 points.
21 MR. GROSSMAN: Were there any other points that
22 you had?
23 MS. HARRIS: Well, just one thing -- sorry Karen -
24 - and that is, based on that there was one revision to
25 condition no. 7. It was the language after the first year

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1 operations.
2 MR. GROSSMAN: Yes.
3 MS. HARRIS: So that would be deleted. Thank you.
4 MR. GROSSMAN: I'm sorry, what would you do with
5 number 7?
6 MS. HARRIS: So, the provision that says, it's the
7 beginning of the second sentence, after the first year of
8 operations.
9 MR. GROSSMAN: Right.
10 MS. HARRIS: Because now there's not a limitation
11 -- there's not a limitation imposed, the 12 million --
12 MR. GROSSMAN: I see. The 12 million gallon
13 limitation would start at the very beginning is what you're
14 saying?
15 MS. HARRIS: Yes. Sorry, I wasn't clear.
16 MS. CORDRY: I think that's acceptable. I think I
17 understand that point.
18 MR. GROSSMAN: Right. And we're talking about the
19 six month provision is what you're saying, the 6 million
20 gallon.
21 MS. ROSENFELD: And converting it to 12.
22 MR. GROSSMAN: Right. Okay. You had a couple of
23 other --
24 MS. CORDRY: In 13 where we had agreed earlier
25 that we take out the coincided with the retail store

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1 operations. But, after a little more discussion, we want to
2 add back in, to coincide with the hours of the station. I
3 think they've testified a number of times that they would
4 only have delays -- I mean, deliveries, while the station
5 was open. But, we want to just have that be a specified
6 statement here, and I believe Mr. Brann agreed that was, and
7 Mr. Ushita (phonetic sp.) as well, that that was acceptable.
8 MS. HARRIS: That's acceptable.
9 MR. GROSSMAN: Okay. So, to coincide --
10 MS. CORDRY: With the hours of station operation.
11 MR. GROSSMAN: -- with the hours of station
12 operation. Okay.
13 MS. CORDRY: Let's see. At 22, we had suggested
14 that an allowable use that they could do would be to, that
15 they could go on the Forest buffer area in order to do trash
16 removal. It's not requiring them to do it, but we certainly
17 don't think they should be prohibited from doing it if their
18 attendant has got nothing better to do, and sees trash
19 piling up there.
20 MR. GROSSMAN: Let's not go too far afield. I
21 don't think they're going to be prosecuted if they pick up
22 some trash.
23 MS. CORDRY: Well, I'm just, you know, it's just
24 kind of a weirdly phrased provision in some ways.
25 MR. GROSSMAN: Okay. We also, I guess, don't need

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1 any required monitoring device addition. So, we can take
2 that out.
3 MS. HARRIS: Correct.
4 MS. CORDRY: Let's see. In paragraph 25, just a
5 couple of minor changes there. We had, this refers to
6 vehicle/pedestrian accidents, and we had included bicycles
7 in there, so vehicles/pedestrian/bicycle or vehicle and
8 pedestrians and bicycles.
9 MR. GROSSMAN: Okay. Vehicle/pedestrian or
10 bicycle accidents.
11 MS. CORDRY: Right. And then, let's see, a couple
12 of sentences down it talks about the reports for the on-site
13 accidents. We thought that was a little unclear. What we
14 had suggested was, reports for accidents within the special
15 exception area which, I believe, is what they're talking
16 about as on-site. And then off --
17 MR. GROSSMAN: What sentence are you on?
18 MS. CORDRY: Let's see. It would be the sentence
19 that starts on the fifth line, the reports --
20 MR. GROSSMAN: Reports for on-site accidents shall
21 identify the date of any such -- but I also have a provision
22 of reports of off-site accidents.
23 MS. CORDRY: Right. I think both of those should
24 be clarified in that we're talking about reports, and I
25 believe this is what you're talking about in terms of on-

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1 site and off-site, is within the special exception area and
2 outside the special exception area. I think that's the
3 distinct they're making between on-site and off-site.
4 MR. GROSSMAN: Okay. Accidents within the special
5 -- instead of on-site, within the special exception area.
6 MS. CORDRY: Or you just don't need on-site. In
7 other words, within the special exception area would
8 substitute for on-site.
9 MR. GROSSMAN: Right. Accidents outside the
10 special exception area. All right.
11 MR. SILVERMAN: Outside the special exception
12 area, they have to report on those accidents?
13 MS. CORDRY: Yes.
14 MR. GROSSMAN: Yes.
15 MS. HARRIS: With the qualifier that the focus is
16 obviously is the area near the gas station, which is from
17 the southwest. I'm sorry. From the drive isle that runs
18 east/west southward.
19 MR. SILVERMAN: Yeah, the reality though --
20 MS. HARRIS: And that we know about, obviously.
21 MR. SILVERMAN: The reality is that whatever
22 happens at the gas station is going to affect general
23 conditions at the mall.
24 MS. CORDRY: It's really just a distinction
25 between how much information they will be likely to have

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1 gathered. Towards the bottom there, there's a reference to
2 the Pedestrian/bicycle and Traffic Safety Advisory
3 Committee, we would just have added Montgomery County in
4 front of that just so it's clear where that one comes from.
5 MR. GROSSMAN: Okay.
6 MS. CORDRY: Then, let's see, one thing we had
7 suggested also, I'll show you over here on this exhibit.
8 Right now there's a sidewalk that comes down alongside the
9 warehouse to this point, but then there is an unpaved area
10 here, and then there's the area across the loading dock and
11 then you would have the pedestrian path down on the very
12 south side of the ring road. So between -- once you come
13 off the ring road and there will be a crosswalk there, but
14 then there will be nothing that you feed into until you get
15 all the way up here, and we were suggesting that a sidewalk
16 should be built the rest away across here, and then a
17 crosswalk should be marked across here so that there's a
18 clear defined place for pedestrians to come all the way up
19 here and to the store.
20 MR. GROSSMAN: You're suggesting that as an
21 additional condition?
22 MS. CORDRY: Yes, yes. We do believe that that
23 would be appropriate to make it so you don't walk off the
24 sidewalk and then right into the middle of the traffic going
25 up and down here. I mean, we're trying to get sidewalks to

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1 keep people out of the drive isles.
2 MR. GROSSMAN: Right. That wasn't one of the
3 agreed upon conditions.
4 MS. CORDRY: No, it was not.
5 MR. GROSSMAN: And, I'm not inclined to recommend
6 that as a condition.
7 MS. CORDRY: Okay, but you will have people back
8 in the drive isle which will increase the congestion. And
9 the last piece we did is, we do have a response to your
10 point about the question about idling and sings and so
11 forth. I think the answer is that there is evidence in the
12 record that does indicate that there would not be a problem
13 with people continue to turn their engines off while they're
14 waiting in line. What we have put in here references that.
15 MR. GROSSMAN: All right. We need another exhibit
16 number, 636.
17 (Exhibit No. 636 was marked for
18 identification.)
19 MS. CORDRY: Obviously, we don't necessarily
20 assume that if you impose this --
21 MR. GROSSMAN: Hold on, I have to identify what it
22 is. So, this is response of Kensington Heights Civic
23 Association to hearing examiner's comments regarding any
24 potential condition concerning idle. All right.
25 MS. CRODRY: And first off, we would note that by

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1 putting this condition, and it's not that we necessarily
2 assume that most people actually pay any attention to those
3 signs. We expect it will be very difficult to get people to
4 turn off their engines and not idle at the station when it's
5 hot or when it's cold, or when they want to play their radio
6 and so forth, which is one of the reasons why we say it's
7 going to be inevitable that we will have all this idling
8 emissions that we are concerned about, both for the health
9 standards and for the idling, the greenhouse gases and so
10 forth that we talked about. But, that said, at least to
11 whatever extent people can be talked into doing it, it would
12 be of benefit to reduce the amount of idling that goes on
13 there.
14 And, your question was, you had some concern about
15 whether it might be a turning on and off, might do somehow
16 that. And, I would say that there was no testimony
17 whatsoever to suggest that simply turning an engine on and
18 off creates some surge itself of pollution there.
19 MR. GROSSMAN: I know, but was there testimony
20 that it doesn't?
21 MS. CORDRY: Let me walk you through this, yes.
22 Well, in the first place, if you thought that that was the
23 case, then all hybrid cars would cause problems because they
24 turn their engines on and off constantly. And, certainly,
25 that's never been suggested that the turning on and off.

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1 What comes up to the issue is with respect to the question
2 of, warm and cold cars. Let's me just walk through this
3 very quickly. First off, and then I put in here just a
4 little calculation, but the amount of time you need to move
5 the 20 feet or so for each space --
6 MR. GROSSMAN: The hybrid car, you're talking
7 about turning on and off their electrical engines?
8 MS. CORDRY: No. Well, the gas engine. A hybrid
9 car you turn off the gas engine as soon as it stops.
10 MS. ADELMAN: A hybrid car it does it itself.
11 MS. CORDRY: And, it does it constantly. And no
12 one has suggested that somehow is a bad thing. Well, I
13 mean, the point is, if you don't have any evidence in the
14 record of that. In any case --
15 MR. GROSSMAN: It's not in my record. No, but I
16 mean, my concern was that I wasn't sure whether that might
17 have an adverse impact turning it on and off, so I was
18 afraid to suggest a condition in which we didn't have a
19 record discussion of that.
20 MS. CORDRY: Well, that's what I'm putting in. We
21 have a number of the exhibits in there. We didn't spend a
22 huge amount of time on this, but if you go through the
23 exhibits here, and I'm pointing them out to you, one, the
24 amount of time you would need to have the car -- it's not
25 the turning on and off that does it. Then there's a

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1 question of --
2 MR. GROSSMAN: Well, is there evidence directly on
3 that point as to what is the impact on turning off and on
4 car engines repeatedly in terms of emissions?
5 MS. CORDRY: Yes. There's a lot of evidence that
6 talks about the value of turning car engines off. That
7 there's no need to leave them on to have them warm up. The
8 catalytic converters --
9 MR. GROSSMAN: No, I know that. But that was in
10 terms of warming up and after 20 minutes and so on. We're
11 not talking about that here. We're talking about people in
12 a queue and whether or not they're turning on and off their
13 engines every two minutes.
14 MS. CORDRY: Okay. Number one, if that was a
15 problem, you would expect to see it. There was absolutely
16 no evidence whatsoever in the record that suggested that's a
17 problem.
18 MR. GROSSMAN: Well, try to answer my question
19 directly. Was there evidence in the record that turning
20 engines on and off every couple of minutes was not a problem
21 in terms of emissions?
22 MS. CORDRY: I'm not sure there's evidence that
23 says it's not a problem. What I can tell you specifically
24 in those words, what I can tell you is that one of the DOE
25 reports, which is, for instance, Exhibit 365(k), which is

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1 from the Department of Energy, it talks about advances in
2 vehicle technology have eliminated the need for idling. The
3 catalytic converter works better. It says drive through
4 lines are common places for vehicles to idle. If the line
5 at the drive through restaurant or bank is long, you should
6 consider turning off your car while you wait. And, it
7 specifically said, one of the things that citizens should
8 undertake to try to do things better is to go to the manger
9 of your bank, drive through restaurant or pharmacy about
10 ways to reduce wait times in line as a way to reduce idling.
11 Suggest that signs be posted to remind patrons not to idle.
12 I would suggest that that is a very comparable situation.
13 If you're waiting to drive up to the --
14 MR. GROSSMAN: It may be. There is some evidence
15 on that point.
16 MS. CORDRY: And that is their advice is to, you
17 shouldn't idle and you should ask the managers of these
18 places not to idle. We have it in more detail here, but I
19 think the answer is that there is strong evidence that the
20 overall reduction in emissions will be by not having people
21 idle while they are sitting there. It certainly reduces the
22 CO2 directly. But that's just an inevitable consequence of
23 having the engine running. And, on the NAAQS --
24 MR. GROSSMAN: I don't know that -- once again, I
25 don't know that it's inevitable that not having the engine

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1 running for the two minutes rather than turning it on and
2 off eliminates or reduces the CO2. It may be the case.
3 And, I haven't read the references you have here. I just
4 expressed my concern about it because I didn't want to do
5 something that would be potentially harmful, or suggest it
6 to the Board of Appeals in a condition. I'm going to give
7 the applicant an opportunity to respond to Exhibit 636, and
8 let's also say by the 29th. Is there anything further?
9 MS. CORDRY: No. We have this in here. If you're
10 going to give them time to respond, that's fine. I just
11 think there's no evidence to suggest it's worse, and
12 considerable evidence that suggests that the authoritative
13 recommendations are to turn your car off if you're idling,
14 if you're waiting for anything more than just a few seconds.
15 MR. GROSSMAN: I hear you. I mean, I don't think
16 that they would necessarily object to it, but --
17 MS. CORDRY: Well, they didn't agree to that
18 request when we put it in.
19 MR. GROSSMAN: It was just my concern. But, do
20 you have an oral response to the question of no idling?
21 MS. HARRIS: A couple of things initially. And
22 that is, first of all, they're not technically idling,
23 because no car is sitting stationary for five minutes.
24 They're moving up.
25 MR. GROSSMAN: No, I know, but, I mean, we're not

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1 talking about violation of the law here. We're talking
2 about whether or not it is a sensible condition to say, to
3 have a sign that says, please don't sit there and idle, or
4 whether that potentially would be harmful by constantly
5 turning off and on engines.
6 MS. HARRIS: I think the record was so devoid of a
7 discussion on this that we don't know. And, to think that
8 within, you know, buried deep in a DOE document that there's
9 one paragraph about encouraging your bank manager to develop
10 policies, that doesn't go to the science of whether it
11 creates more pollution. I mean, think about the extensive
12 studies that Mr. Sullivan has done on the various issues in
13 this case. I don't think we have an answer.
14 MR. GROSSMAN: Okay. Well, once again, I'll
15 invite you, you can respond if you want by September 29th.
16 So the way we'll leave it, first of all, I know I already at
17 the last hearing indicated that all of the exhibits except
18 as otherwise noted will be admitted, and that'll include
19 Exhibits 1 through 636 and their subparts, and except for
20 ones that we said would not be admitted in earlier
21 transcripts. And, also, will be admitted the responses
22 which I have permitted here by the 24th and the 29th of
23 September, but only on those limited points that we talked
24 about. And, --
25 MS. CORDRY: Actually, I'm sorry, Mr. Grossman,

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1 there was one last point, and we just emphasize the one that
2 was, I believe 30A and actually relate to these other idling
3 points, the ones about truck idling, that we'd ask that they
4 be required not to have their trucks idle for more than five
5 minutes unless they could find a basis under Maryland law.
6 That they shouldn't idle on the ring road under any
7 circumstances for more than five minutes, and if they could
8 lawfully idle, move them off the ring road and into the
9 parking lot.
10 MR. GROSSMAN: You're talking about the --
11 MS. CORDRY: COSTCO trucks.
12 MR. GROSSMAN: The COSTCO trucks, or the trucks
13 that are refueling the gas station?
14 MS. CORDRY: No, the COSTCO, well, we have a
15 separate one about the fuel delivery trucks turn off when
16 they get there, so they don't idle. But there are trucks
17 that come repeatedly to the warehouse and idle --
18 MR. GROSSMAN: But, that's not part of the
19 jurisdiction of this case.
20 MS. CORDRY: Well, no, but it does create part of
21 the background that increases the level to which the station
22 would be adding.
23 MR. GROSSMAN: It doesn't matter. The no but,
24 there answers the question. We don't have jurisdiction over
25 what those trucks do.

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1 MS. CORDRY: Not even that they're COSTCO
2 warehouse trucks that are increasing the background for the
3 station. All right.
4 MR. GROSSMAN: No, it's not part of this case.
5 Okay. Let's see. The filing I said was allowed by the 24th
6 was --
7 MS. CORDRY: Dr. Cole, just if we had any other
8 comments on the monitoring.
9 MR. GROSSMAN: Right. Dr. Cole responds on
10 monitoring. And on the 29th was COSTCO response to Dr.
11 Cole, if he files something by the 24th. And also, COSTCO
12 response to Exhibit 636. Okay.
13 MS. HARRIS: And the Westfield letter on the 29th?
14 MR. GROSSMAN: Yes. And the Westfield letter on
15 the 29th. It can be before the 29th, which would be nice.
16 But no later than the 29th, indicating their consent to
17 monitoring station in the parking lot adjacent to the
18 subject site. Okay. I think that handles everything. And
19 once again, the record is only open for the receipt of those
20 limited filings, including the transcript by September 29th,
21 and the record will close at the close of business on
22 September 29th. My report is theoretically due 30 days
23 thereafter. Well, I see Ms. Duckett's hand.
24 MS. DUCKETT: Yes. Kensington View has some
25 comments about the conditions.

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1 MR. GROSSMAN: Oh, okay. I'm sorry. You are
2 correct. Come on forward. I'll finish my sentence though.
3 MS. DUCKETT: I'm sorry.
4 MR. GROSSMAN: Well, you should have interrupted.
5 I appreciate your interrupting. I'm sorry I neglected to
6 call upon you. And that is, that my report is theoretically
7 due 30 days after the close of the record. I suspect that
8 with a record this size that that is an unrealistic
9 expectation. I'm empowered to extend my time as need be,
10 and I suspect that that will happen. So, don't look for a
11 report within 30 days. I can't remember the last time I
12 extended my time on anything. But this one case is one that
13 I think it will be necessary.
14 MS. CORDRY: You perhaps cannot remember another
15 time that a hearing went 36 days.
16 MR. GROSSMAN: Yes, it's not a frequent incident.
17 Well, I pride myself on getting things out within my time
18 periods, but I don't think it's possible here. Yes, Ms.
19 Duckett?
20 MS. DUCKETT: Eleanor Duckett, Kensington View.
21 We understand the hearing examiner's concerns as stated in
22 their September 10, 2014 e-mail to Kensington View, but we
23 believe the traffic patterns are exactly why this
24 application should be denied or conditions need to be placed
25 should this application be approved. The first condition

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1 the hearing examiner proposed is that the petitioner be
2 bound by all of its testimony and exhibits, by its witnesses
3 and representatives or counsel, yet KVCA is not sure what
4 binds COSTCO to their testimony. COSTCO has testified and
5 presented evidence that there are five entrances to the mall
6 from two state/public highways, yet COSTCO does not control
7 any of those entrances, nor do they control any of the
8 current traffic patterns. There are no easements or legal
9 agreements that guarantee the vehicular access to all of
10 these entrances will exist at any time in the future.
11 Mr. Guckert testified that because of these five
12 entrances, there will only be an increase of one to two cars
13 per light cycle at the Valley View entrance. Mr. Guckert
14 presented video to show that at times cars are already
15 blocking traffic on University Boulevard as they try to
16 enter the Valley View entrance. One or two cars might not
17 make much of a difference, but the one or two cars are based
18 on five COSTCO gas station entrances. Mr. Guckert presented
19 studies that show that intersection 16, currently has
20 problems, but COSTCO has no control over this intersection.
21 Mr. Guckert testified that there will be no
22 problems emptying into a parking lot, but COSTCO does not
23 control that parking lot. COSTCO presented evidence of
24 various other COSTCO gas stations, but in each example,
25 unlike this application, those COSTCO gas stations are

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1 placed on land that COSTCO controlled. COSTCO testified
2 that the mall is split zoned and, in fact, --
3 MR. GROSSMAN: Let me stop you for a second.
4 You're in effect making closing argument here.
5 MS. DUCKETT: No, I'm not. No, I'm not. I'm
6 arguing as to why you should consider the original request
7 that we made on the traffic patterns.
8 MR. GROSSMAN: The request for conditions that you
9 submitted, you're talking about?
10 MS. DUCKETT: Right. I'm talking about our
11 original conditions that we submitted dealt with the traffic
12 patterns, and we requested that at a minimum, it's in here
13 somewhere --
14 MR. GROSSMAN: This is what you --
15 MS. DUCKETT: At a minimum there's something that
16 has to do with these traffic patterns. So that's what I'm
17 talking about, are those traffic patterns. You know, the
18 fact that there are currently three on Viers Mill Road, and
19 we wanted some type of conditions to say that they will be
20 there. But, I can finish -- can I finish?
21 MR. GROSSMAN: Yes, but I -- the specific
22 conditions you're talking about -- we also request the
23 following conditions. This is what you're talking about,
24 correct?
25 MS. DUCKETT: Yes.

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1 MR. GROSSMAN: Yearly reviews by Montgomery County
2 Department of Transportation, and Maryland State Highway
3 Administration.
4 MS. DUCKETT: But, what I'm dealing with right
5 now, and I'm not going to, you know, you made your decision
6 on those conditions. What I'm dealing with is the first
7 part of our request, is that a minimum -- I don't have it.
8 I have it here somewhere.
9 MR. GROSSMAN: As a minimum traffic pattern
10 condition, the access into the mall and traffic patterns
11 within the mall be listed as a condition for approval.
12 MS. DUCKETT: Yes.
13 MR. GROSSMAN: Once again, I'm not going to do
14 that because it's outside of the bailiwick of this case. I
15 can't respond to every traffic issue within the mall.
16 MS. DUCKETT: No. Can you let me finish please?
17 MR. GROSSMAN: I'm going to in a second.
18 MR. GOECKE: And, if I may, I think this may
19 address your concern. I'm informed that COSTCO has a
20 reciprocal easement for these entranceways as well as part
21 of the lease, the 40 year lease as well. So, they are
22 guaranteed access to this. While, COSTCO technically does
23 not control it --
24 MS. DUCKETT: To all five? So that if Westfield
25 changes. I haven't seen that. I haven't seen --

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1 MR. GOECKE: That's correct. I don't think it's
2 in the record, and we can confirm that, but I -- and Mr.
3 Brann has informed me that's part of the mall's adequate
4 public facilities requirements to maintain those access to
5 the mall.
6 MS. DUCKETT: Well, I'll get to that. I address
7 that.
8 MR. GROSSMAN: Go ahead, you may finish, Ms.
9 Duckett.
10 MS. DUCKETT: We did it at home, only took five
11 minutes.
12 MR. GROSSMAN: Okay. Well, you just frightened me
13 because you had big sheaf of paper there.
14 MS. DUCKETT: Oh, no, no, I've made copies for
15 everybody if they wanted it, and my notes. COSTCO testified
16 that the mall is split zoned and the fact that the C-2 zone
17 was not changed during the recent sector plan, indicates
18 that this portion of the mall should be autocentric. While
19 we disagree on the meaning of the fact that the zoning did
20 not change, we'd like to point out that four of the five
21 entrances to the mall were changed from C-2 to CR which, by
22 anyone's definition, is not autocentric zoning.
23 While we understand the hearing examiner's
24 reluctance to place certain conditions that we requested, we
25 have great concerns about the traffic patterns should they

C E R T I F I C A T E

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Office of Zoning and Administrative Hearings for Montgomery County in the matter of:

Petition of COSTO Wholesale Corporation
Special Exception No. S-2863
OZAH No. 13-12

By:

Keena Lukacinsky, Transcriber

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