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To:	Chairperson Lloyd Jordan and Members D.C. Board of Zoning Adjustment
From:	John Ray Howard H. Yuan Counsel to the Independent Gas Station Operators Alliance
Date:	August 28, 2012
Subject:	Preliminary Statement in Opposition to Costco's Application for Special Exception

OVERVIEW

The law firm of Manatt Phelps & Phillips, LLP, on behalf of our client, the Independent Gas Station Operators Alliance ("IGSOA"), respectfully requests that the District of Columbia Board of Zoning and Adjustment ("BZA") deny Costco Wholesale Corporation's ("Costco") request for a special exception to construct a gasoline station on Square 4327, a C-2-B District within Northeast Washington, D.C. (the "District") for the following reasons:

1. Costco's proposed gasoline station directly violates Section 25-313(d) of the District of Columbia ("DC") Code prohibiting establishments from selling both motor vehicle gasoline and alcohol[1];

2. Costco's application for the special exception, and its accompanying traffic study, is flawed and unreliable;

3. Costco's proposed gasoline station is harmful to the community and the environment and inappropriate for The Shops at Dakota Crossing shopping center; and

[1] Costco's initial request to the Alcoholic Beverage Control ("ABC") Board to transfer its ABC license to its new store failed to mention any plans to construct a gasoline station on site, Square 4327. Accordingly, the IGSOA had no reason to protest Costco's proposed store. To the extent that the BZA now finds it appropriate, the IGSOA also requests that this matter be referred to the ABC Board for their review.

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4. In seeking a special exception to construct a gas station in a C-2-B District, Costco fails to offer any supporting evidence and/or empirical data that there is a need for another gasoline station, particularly a "gas-n-go" station, in this area of the district.

<u>ANALYSIS</u>

I. Section 25-313(d) of the DC Code Clearly and Unambiguously Prohibits Costco from Operating a Gasoline Station and Obtaining or Possessing an Alcoholic Beverage License.

The DC Code clearly prohibits Costco's proposed dual operations of selling alcoholic beverages and gasoline from Square 4327. Section 25-313(d) of the DC Code states, "No license shall be issued for an outlet, property, establishment, or business which sells motor vehicle gasoline or which holds a Motor Vehicle Sales, Service, and Repair endorsement under § 47-2851.03(c)(9) or an Environmental Materials endorsement under § 47-2851.03(c)(4) to its master business license." The language of this section unambiguously states that obtaining or possessing an alcoholic beverage license is mutually exclusive with selling motor vehicle gasoline. Put another way, this statute prevents businesses that sell gasoline from obtaining an alcoholic beverage license, or *vice versa*, a business with an alcoholic beverage license from selling gasoline. Accordingly, because Costco is an "outlet, property, establishment, or business" that possesses an alcoholic beverage license, it can not also operate gasoline stations.

A. <u>Section 25-313(d) of the DC Code clearly and unambiguously prohibits Costco from operating a gasoline station and possessing an alcoholic beverage license.</u>

It is well settled that when interpreting statutes, courts will first look to the text of the statute itself. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If the statute's text is clear and unambiguous, then courts have no need to go any further. *Id.* More specifically, the Court has stated:

> "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Id. (internal citations omitted).

Here, the DC Code unambiguously prohibits an "outlet, property, establishment, or business" from selling both alcohol and motor vehicle gasoline. DC Code § 25-313(d). Thus, because Costco qualifies as an outlet, establishment, and business, as discussed in detail in Section I.B. below, Costco is prohibited from selling alcohol and operating a gasoline station. No further statutory interpretation is necessary.

Until 2004, the DC Code unambiguously held that national grocery chains like Safeway were only able to obtain one ABC license. For example, until the law was changed, a Safeway store on Capital Hill held the single license that Safeway was able to hold, preventing any of its other District locations from selling alcohol. The Giant at O Street held and the Seven Eleven store on Georgia Avenue held the single ABC licenses for each of its respective chains. In order for these national and regional grocery chains to get multiple licenses, they had to get the City Council to amend the law to allow them to hold multiple licenses. In 2004, the City Council passed the "Title 25, D.C. Code Enactment and Related Amendments Act of 2000" (Bill 13-449, DC Law 13-298), which allowed these establishments to hold multiple licenses under certain conditions. Similarly, in this instance, Costco is unambiguously prohibited by the DC Code from selling both liquor and gasoline. If Costco hopes to sell both, then the law must be amended to let it do so.

B. Costco qualifies as an "outlet, property, establishment, or business" as referenced in Section 25-313(d).

As defined by the DC Code or, alternatively, Merriam-Webster Dictionary ("Webster"), Costco clearly qualifies as a business, establishment, or an outlet and is therefore governed by Section 25-313(d) of the DC Code. Section 25 of the DC Code defines "Establishment" as "a business entity operating at a specific location." DC Code § 25.101(21). Section 29 of the DC Code defines "Property" as "all property, whether real, personal, or mixed, or tangible or intangible, or any interest therein." DC Code § 29.101.02(35).

The DC Code does not seem to define the terms "outlet" or "business." However, in situations such as these, the Court has held, "When a term is undefined, we give it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008) (citing to definitions provided by the Oxford English Dictionary, Random House Dictionary, and Webster's New International Dictionary). Accordingly, Webster's defines "Outlet" as "an agency (as a store) through which a product is marketed". http://www.merriam-webster.com/dictionary/outlet. Webster's defines "Business" as "a commercial or sometimes an industrial enterprise". http://www.merriam-webster.com/dictionary/business. Of note, neither these definitions, nor the statute itself, provides any type of exception allowing certain types of businesses (*e.g.*, "membership warehouses") to sell both alcohol and motor vehicle gasoline. *See* Coscto's Investor Relations

Homepage, Investor Overview, http://phx.corporate-ir.net/phoenix.zhtml?c=83830&p=irol-homeprofile.

On its Investor Relations Homepage, Costco describes itself in the following way:

> Costco Wholesale Corporation operates an international chain of membership warehouses, mainly under the "Costco Wholesale" name, that carry quality, brand name merchandise at substantially lower prices than are typically found at conventional wholesale or retail sources. The warehouses are designed to help small-to-medium-sized businesses reduce costs in purchasing for resale and for everyday business use. Individuals may also purchase for their personal needs.

Id. Noteworthy, Costco also describes its gasoline stations as part of the overall company's operations:

> Members can also shop for private label Kirkland Signature products, designed to be of equal or better quality than national brands, including juice, cookies, coffee, tires, housewares, luggage, appliances, clothing and detergent. **The Company also operates self-service gasoline stations at a number of its U.S. and Canadian locations.**

Id. (emphasis added).

From these brief excerpts it is clear that Costco qualifies as a business, establishment, or an outlet as those terms are defined by the DC Code or Webster's Dictionary. Costco and its 606 membership warehouses is a commercial enterprise. *See* Coscto's Investor Relations Homepage, Investor Overview, http://phx.corporate-ir.net/phoenix.zhtml?c=83830&p=irol-homeprofile. Costco and its proposed District location is a "business entity operating at a specific location." DC Code § 25.101(21). And finally, its membership warehouses are stores where products are marketed and sold. Thus, in this instance, it is clear that Section 25-313(d) of the DC Code is controlling and Costco may not sell both motor vehicle gasoline and alcohol from its proposed Northeast District establishment.

C. Despite its various offerings, Costco's Proposed Operation is a Single Establishment.

In response to the IGSOA's discussion of Section 25-313(d) of the DC Code, Costco will likely counter with the claim that its gasoline station is a separate entity from the membership warehouse itself and Section 25-313(d) therefore does not apply. This argument goes against logic and the intent of the law.

Regardless of where Costco locates its gasoline station on Square 4327, the proposed gasoline station would be a core component of Costco's retail operations. First, the new store and the gasoline station will all be located on the same square, Square 4327. Second, customers of the warehouse and/or gasoline station will be required to purchase Costco memberships, and only Costco members will be allowed to purchase gasoline at the gasoline station. *See* Wells & Associates Traffic Study at 1. And third, Costco's gasoline sales are included as part of the company's total net sales in its annual financial reports. *See* Costco FY2011 Annual report, http://phx.corporate-ir.net/phoenix.zhtml?c=83830&p=irol-reportsannual. Individually and in the aggregate, these facts clearly exhibit that Costco's gasoline stations are not separate from the rest of the "outlet", the "property", the "establishment", or the "business".[2] Accordingly, Costco's proposed District operations clearly falls within the intended scope of Section 25-313(d) which prohibited an establishment from selling both alcohol and motor vehicle gasoline.

D. Legislative History

Prior to 1984, the District, like many other jurisdictions allowed gasoline stations to sell beer and wine. However, when two gas stations applied for ABC licenses in 1984, discouraging drinking and driving became an important public policy to promote this policy, the DC Council passed a law prohibiting the sale of alcohol at gas stations, which in its current form is Section 25-313(d). *See* Councilmember John Ray, *Committee Report on Bill 5-70, the "Prohibition on Sale of Alcoholic Beverages at Gasoline Stations"* at (Mar. 6, 1984) (noting Vice-President of the Washington, D.C. Retail Liquor Dealers Association Mr. Eric Meyers' statement that "the sale of alcoholic beverages at retail gasoline outlets would increase the risk of accidents due to intoxication."). Discouraging drinking and driving was an important public policy in 1984 and it is still an important policy now. Allowing Costco to construct its gasoline station and sell alcohol would violate this public policy and the intent of Section 25-313(d), as exhibited by its legislative history.

2 Furthermore, while the IGSOA has not seen the proposed layout of Costco's District store, to the extent that Costco's liquor store is easily accessible for customers who have just purchased gasoline, Costco's layout is additional evidence that the gasoline station and liquor store are part of the same establishment and should be prohibited.

II. Costco's Application for a Special Exception to Construct Its Proposed Gasoline Station, along with Its Supporting Traffic Study, is Flawed and Fails to Meet the Requirements of the Relevant Zoning Regulations.

To support its application for approval of a special exception to construct the proposed gasoline station (the "Application"), Costco has submitted a June 8, 2012 traffic study by Wells and Associates (the "Traffic Study"). The Wells Traffic Study is flawed and fails to meet the requirements of Section 706.4 of the DC Zoning Regulations. Accordingly, the BZA should not grant Costco's Application for special exception to construct its proposed gasoline station.

As noted by Costco in the Application, "The Board's discretion to grant special exceptions is limited to a determination whether the exception sought meets the requirements of the regulation." *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973). However, the burden is on the applicant to show that it's proposal satisfies all the requirements of the relevant regulations. *See Id.* (stating, "The burden of showing that the proposal meets the prerequisite enumerated in the particular regulation pursuant to which the exception is sought rests with the applicant."). In situations where the applicant has made the requisite showing, "the Board ordinarily must grant his application." *Id.*

The Application failed to meet the burden required in zoning regulation 706.4. Zoning regulation 706.4 states that a station "shall not create dangerous or other objectionable traffic conditions." 11 DCMR § 706.4. To address this requirement, Costco relies on its Traffic Study. *See* Application, Preliminary Statement of Compliance, at 2. However, the Traffic Study is flawed and can not be relied on to address this regulation's requirements. When discussing the site trip generation (*i.e.*, "new trips", "internal trips", and "pass-by trips) of the proposed gasoline station, the Traffic Study bases its analysis on a Costco located in Sterling, Virginia. *See* Traffic Study at 7-9. This comparison is flawed and fails to provide a reasonable estimate of the site trip generation likely to result from the proposed station in the District. The Sterling Costco is located in a suburban area that is less dense than the District location, and it is not located in a semi-gated community of 7,231 residents with several more residential developments planned. *See* Exhibit 3 (CBRE Property Profile, The Shops at Dakota Crossing). Further, there are multiple national membership warehouse stores in the Northern Virginia area for customers to patronize. For now, there will only be one in the District. As the only national membership warehouse in the District, Costco will attract customers, and traffic, from all over the City and the "adjacent Maryland suburbs."[3] *Id.*

Moreover, while the Traffic Study is designed to address the impact of the Costco on traffic, the study ignores and fails to evaluate the impact of vehicular traffic generated by other entities located at "The Shops at Dakota Crossing" ("Dakota Crossing") shopping center. We do not believe that this impact can be totally ignored because all of the traffic generated by Dakota Crossing shopping center will impact the whole. Until the Traffic Study is able to address this flawed comparison between the Sterling, VA and Washington, DC Costco locations, and the

[3] ANC Commissioner Bob King himself has stated that traffic would be "the most important problem" with the new Costco. Simmons, Deborah, *Exacting cost for Costco's arrival in D.C.*, Washington Times, June 20, 2012. Mr. King added that "shoppers will be flowing in from all around the city" and that the "site stands at the gateway to and from I-295, I-95 and Route 50, which means visitors and commuters will be pouring in from points well beyond the Beltway." *Id.*

uniqueness of the location of the District Costco, the Application fails to meet the requirement set forth in Section 706.4 of the zoning regulations.

For the above reasons, it is clear that Costco's Application failed to meet its burden under the relevant requirements.[4]

III. Costco's proposed District gasoline station would be harmful to the community and the environment, inappropriate, and unnecessary.

A. Costco's Proposed Gasoline Station is Harmful to the Fort Lincoln Community and Threatens Full Service Stations, Small Businesses, and Competition

Increasingly aware of the decreasing number of full service retail service stations ("full service stations")[5], in 1977, the DC Council enacted the Retail Service Station Act of 1976. Councilmember Phil Mendelson, *Report on Bill 15-914, the "Retail Service Station Amendment Act of 2004"* at 8 (Oct. 27, 2010). This law prohibited the conversion of full service stations into "non-full service stations," also known as "gas-n-gos." *Id.* at 1, 3. The law also served to advance three "important public policies": 1) protect the remaining full service stations in order to ensure continued "access to full automotive services" for District residents; 2) "encourage local, small, and disadvantaged businesses"; and 3) "promote competition". *Id.* at 6. Initially, this law was passed with a sunset provision, but was subsequently extended nine times. *Id.* at 1.

4 It is our understanding that Costco may be amending its traffic study. We reserve the right to submit additional comments on the traffic study before the September 11 hearing.

5 As defined by the DC Code, full service retail service stations are "any retail service station location which provides a garage, service bay, work area, or similar enclosed area for repairing, maintaining, servicing, or otherwise working on motor vehicles, or any service islands. Such repair, maintenance, and service work may include, but is not limited to, the installation or replacement of batteries, tires, fan belts, lights, brakes, water pumps, mufflers and other parts and accessories and the performance of motor oil changes, lubrications, wheel alignments, tune-ups, tire repairs, brake adjustments, and general repair and maintenance work and services." DC Code § 36.304.01(a).

On April 8, 2005, the Retail Service Station Amendment Act of 2005 (B-15-0914) was enacted into law, making permanent this moratorium on the conversion of full service stations. *See* DC Council LIMS Page, Search for L15-297, http://dcclims1.dccouncil.us/lims/searchbylegislation.aspx.

Costco's proposed gasoline station endangers all three of these "important public policies." *Id.* at 6. **First**, Costco's proposed station will make it exceptionally difficult for full service stations in the District to remain open and accessible to local residents. The permanent statutory moratorium on converting full service stations clearly expresses the importance of protecting these stations. More specifically, as noted by Councilmen Mendelson, full service stations are important "as a matter of convenience," but also because in cases of emergency "when a car breaks down and repair can be had nearby." *Id.* at 3. If Costco were allowed to construct its proposed gasoline station, it is likely to reduce the gasoline and related profits of all independent gasoline stations operators within a 4.5 radius, of which full service stations will be hit the hardest. *See* Exhibit 1 (Affidavit of John Born) (stating that his repair bay businesses has been "negatively impacted" and that his volume of gasoline sales has gone from 70,000 per month to 35,000 per month since a Costco was built nearby); Exhibit 2 (Affidavit of Sam Aulakh) (stating that his volume of gasoline sales has gone down by 46% since "the arrival of Costco and its gas stations"). *See also* Julie Davis *et al.*, *The Impact of an Urban Wal-Mart Store on Area Businesses*, Center for Urban Research and Learning, Loyal University Chicago, Dec. 2009 (finding that the opening of a Wal-Mart on the West Side of Chicago in 2006 led to the closure of about one-quarter of the businesses within a four-mile radius); Douglass, Elizabeth, *Neighborhood Station on Empty; Changing economics of the fuel and auto repair industries force many retail sites to close. A proprietor in Glendale quits after four decades*, L.A. Times, Dec. 24, 2005.

As the only Costco in the District (in addition to a Shoppers grocery store, and Marshalls in the same shopping center), District residents will likely travel from all parts of the City to buy gasoline and other products at that location, bypassing their local full service stations. *See* Exhibit 3 (CBRE Property Profile, The Shops at Dakota Crossing). As of 2006, only 47 full service stations remain in the District (as opposed to 220 in 1977). *See* DC Department of the Environment/Energy Office, *The District of Columbia Study of Automotive Repairs,* September 2008 at 19.; Mendelson, *Report on Bill 15-914* at 3. If the BZA grants Costco's request to construct a 16 pump "gas-n-go" gasoline station, it is more than probable that the number of fuel service gasoline stations will be further decreased.

Second, Costco's proposed gasoline station will put independent gasoline station operators out of business and discourage potential small entrepreneurs from investing in the District. Costco gasoline stations have markedly reduced revenue in nearby gasoline stations in other cities. For example, in Beltsville, Maryland, two separate independent gasoline station operators have seen their volume of gasoline sales decrease by approximately 50% since a Costco gasoline station was built nearby. *See* Exhibits 1 and 2. The percentage of gasoline sold by large companies like Costco, Wal-Mart, and Sam's Clubs continue to grow, eating into the revenue of independent gasoline station operators (and full service stations), and making it increasingly difficult for these small businesses to keep their doors open. *See C-Stores Losing Gasoline Customers to Other Outlets*, The Washington Post, June 2, 2010; Douglass, Elizabeth, *Neighborhood Station on Empty; Changing economics of the fuel and auto repair industries force many retail sites to close. A proprietor in Glendale quits after four decades*, L.A. Times, Dec. 24, 2005. The Dakota Crossing shopping center – the future home to a Shoppers grocery store, Marshalls, several restaurants, and the District's only Costco – will only magnify the potential loss in revenue that gasoline stations all over the District will experience if Costco is allowed to open its proposed "gas-n-go" gasoline station.[6] *See* Exhibit 3 (CBRE Property Profile, The Shops at Dakota Crossing).

The District has made it an important public policy to "[p]romote the creation of locally-owned, non-chain establishments because of their role in creating unique shopping experiences." *See* The Comprehensive Plan for the National Capital: District Elements, Policy ED-2.2.3 (October 2007). *See also Id.* at ED-3.3 (Small and Locally-Owned Businesses). Allowing

[6] In its profile of Dakota Crossing, CBRE also recognizes that the shopping center will attract customers all over the District and adjacent Maryland suburbs. *See* Exhibit 3 (CBRE Property Profile, The Shops at Dakota Crossing). CBRE states:

> Washington, DC's long anticipated retail development, The Shops at Dakota Crossing, will offer destination retail shopping to the historically underserved District neighborhoods and the adjacent Maryland suburbs. Its strategic location on New York Avenue/route 50 at South Dakota Avenue in the northeast area of Washington, DC, provides excellent visibility and easy access to an impressive 100,000 vehicles per day. The Shops at Dakota Crossing is known as 'The Gateway to Washington.' Retailers will benefit from the enormous regional draw of industry leader Costco, as well as one of the area's top grocers, Shoppers Food. *Id.*

Costco to construct its proposed gasoline station would harm independent gasoline station operators and violate the public policy goals of the District.

Third, Costco's proposed gasoline station will hurt competition in the District. Not only will independent gasoline station operators be unable to compete with Costco, and eventually close, but if the company were to ever shut the proposed station down, the District could be left without a sufficient number of gasoline stations in the area, if any at all.

Costco's proposed gasoline station flies in the face of three important public policies: 1) protecting full service stations, 2) encouraging small businesses, and 3) fostering competition. Thus, Costco's proposed gasoline station is harmful to the Fort Lincoln and surrounding community and should not be allowed to be constructed in the District.

B. Costco's Proposed Gasoline Station is Harmful to the Environment

Costco's proposed gasoline station is to be located in the Fort Lincoln Community, which is a 360 acre site consisting of residential areas, the Marshall EC Elementary School, the Fort Lincoln Recreation Center, a Shoppers grocery store, a Marshalls, other retail establishments, and two restaurants. Gasoline stations are potentially hazardous entities that put all of these other uses at risk. That risk is increased when considering the size of Costco's proposed gasoline station (*i.e.*, 16 pumps and 8 aisles). The proposed gasoline station will create the following risks and should not be allowed to be constructed in the Fort Lincoln Community.

1. Vapor Emissions from Refueling Operations and Storage of Gasoline On Site could Lead to an Increase in Levels of Benzene Air Pollution

Benzene is a potent carcinogen that is found in vapors released to the air from gasoline storage and refueling operations. Levels of benzene in the air are commonly higher around gas stations due to the release of benzene-containing vapors from the storage and dispersal of gasoline in these areas.

The proposed Costco gasoline station operations could raise the levels of benzene in the air in the immediate vicinity of the proposed station. Costco's proposal contemplates very advanced vapor emission control technology at the proposed station. However, no system is completely effective in preventing the escape of fugitive emissions to the air. Additionally, these systems require a certain level of operation and maintenance in order to function at optimal levels. However, even assuming flawless operation and maintenance of the vapor control systems, there would still be some level of vapor emissions to the air. Given the large number of pumps proposed at the station, even small amounts of vapor emissions from each tank and pump could, in aggregate, result in material increases in benzene levels in the air in the immediate vicinity of the proposed station.[7]

[7] Indeed, concern regarding the dangers of Benzene is was one of the reasons that drove the Montgomery County Planning Department to propose requiring gasoline stations to be built at least 300 feet away from any "public or private school or any park, playground, or hospital. . . ." Montgomery County Planning Department, Recommendations for Zonimg Text Amendment (ZTA) No. 12-07, June, 7, 2012. This 300-foot setback was unanimously approved by the Montgomery County Council on July 24, 2012. Gordon, Chris, *Montgomery county Council Votes for Shorter Setback for Mega Gas Stations*, July 24, 2012, http://www.nbcwashington.com/news/local/Montgomery-County-Council-Westfield-Wheaton-Mall-Costco-Gas-Station-Compromise-163585076.html.

2. Water Pollution and Impacts on the Anacostia River Watershed

The proposed station sits in the Anacostia River watershed – a river with a significant history of pollution impaired waters. Given this history, Washington, D.C. has placed an emphasis on returning the Anacostia River to health. *See* The Comprehensive Plan for the National Capital: District Elements, E-1.2 (October 2007) (stating, "In the first years of the 21st century, a major initiative was launched to restore the Anacostia River."). In connection with these efforts, Washington, D.C. and several Maryland counties entered into the Anacostia Restoration Agreement, which establishes goals and objectives for the cleanup and restoration of the Anacostia River watershed. Included in the Anacostia Restoration Agreement is the goal to "dramatically reduce pollutant loads, such as sediment, toxics, [combined sewer overflows], other nonpoint inputs and trash" in the watershed.

The overall proposed development would remove nearly thirty acres of trees and natural cover that absorb and filter stormwater and replace this natural cover with impervious surfaces.[8] These impervious surfaces will result in stormwater runoff containing trash, sediment and other pollutants that will likely be deposited into the Anacostia River watershed. The already

[8] Removing thirty acres of trees violates one of the District's important environmental protection policy goals. The October 2007 Comprehensive Plan for the District clearly states that the District's "Urban Forest" should be protected. *See* The Comprehensive Plan for the National Capital: District Elements, Policy E-1.1 (October 2007). The Comprehensive Plan explains:

> The benefits of a healthy urban forest, including street trees, trees in parks and other public places, and trees on private lands, are well documented. Trees add beauty, improve mental health, reduce water pollution, absorb noise, produce oxygen and absorb greenhouse gases, and provide habitat for birds and small animals. They also add economic value to neighborhoods and contribute to community identity and pride. *Id.*

detrimental effects that the overall development is likely to have on water quality would be exacerbated by the addition of a gasoline station to this development.

As with any gasoline station, some amount of fuel and other substances, such as leaking coolant and anti-freeze from cars, will inevitably be spilled or otherwise deposited at the proposed Costco gas station on a regular basis. These substances will mix with stormwater that falls on the site and will likely eventually be discharged into the Anacostia River watershed. The addition of these toxic substances to the stormwater flowing from the overall development undermines the goals adopted by Washington, D.C. in the Anacostia Restoration Agreement by potentially increasing pollutant loads in the watershed.[9]

3. Potential for Large-Scale Accidents

With a new gasoline station, especially one of this size and magnitude, also comes the potential risk of a gasoline related accident. On June 19, 2001, firefighters discovered a significant gasoline leak at a BP Amoco station at 41st Street and Alabama Avenue in Southeast Washington, D.C. *See* Leonnig, Carol D., *Update; On the News*, Washington Post, Sept. 10, 2001 [hereinafter *Update*]; Leonnig, Carol D., *Gas Station Kept Leak From D.C. Officials; Fumes Forced Evacuations*, Washington Post, Aug. 5, 2001 [hereinafter *Fumes Forced Evacuations*]. The station's records showed that it had leaked 1,392 gallons of gasoline. *See Fumes Forced Evacuations*. At the time, Ms. Vera Jackson, a District Health Department

[9] ANC Commissioner King has also expressed concern about the effects of a gasoline station on the Anacostia River. *See* Simmons, Deborah, *Exacting cost for Costco's arrival in D.C.*, Washington Times, June 20, 2012 (quoting Mr. King state, "There are also wetland issues with the proximity to the Anacostia River and [Costco's] gas station . . . .").

spokeswoman stated, "[A]bout 300,000 square feet could have been affected by the gasoline and its fumes; some gasoline had leaked in the sewer system, although the polluted sewage was treated. The gasoline also contaminated the groundwater, . . ." Raghunathan, Abhi, *Displaced, Despondent After Gas Spill; SE Families Eager to Go Home from Hotels,* Washington Post, July 12, 2001. As a result of this spill, 13 families were evacuated from their homes and forced to live in a hotel. *See Id.* Fearful for their safety, distrustful of the oil company, and resolved to wait for appropriate compensation for their hardship, these 13 families lived in this hotel for over eleven weeks. *See Update.*

All of the relevant and important factors argue against allowing Costco to construct its proposed gasoline station in the Fort Lincoln Community. When considering the abundance of "gas-n-go" stations already in the area and the size of Costco's proposed gasoline station, allowing this gasoline station to be constructed is an unnecessary risk to the residents and others who work, shop, and visit the Fort Lincoln site.

C. Costco's Proposed Gasoline Station is Inappropriate for the "Shops at Dakota Crossing" Shopping Center

As mentioned above, Dakota Crossing shopping center will be home to a Shoppers grocery store, Marshalls, other retail operations, restaurants, and the District's one and only Costco. *See* Exhibit 3 (CBRE Property Profile, The Shops at Dakota Crossing). This will be a highly populated and trafficked area and it would be inappropriate and irresponsible to incorporate a potentially dangerous gas station of this magnitude into the new shopping center (*see* B.1. and B.3. above), in an area that is predominantly a residential development – Fort

Lincoln Community. Additionally, as noted above, there will be several new restaurants in the shopping center, making it even more inappropriate for a gasoline station to be constructed on site.

IV. Costco's Application for a Special Exception to Construct Its Proposed Gasoline Station Failed to Exhibit a Need in Fort Lincoln for Another "Gas-n-Go" Station.

Not only would granting Costco's application for special exception to construct its proposed gasoline station directly violate Section 25-313(d) of the DC Code, but the Application also fails to offer any supporting evidence and/or empirical data that there is a need for another "Gas-n-Go" station in the Fort Lincoln area of the District. By analogy, when an applicant submits an application for approval of a Planned Unit Development ("PUD") to the District's Zoning Commission, it is common practice for an applicant to confirm that the proposed PUD is consistent with the laws and policies of the District. Applicants will also often establish there is a genuine need for the proposed PUD. Here, Costco's Application failed to establish any such need in Fort Lincoln for another gasoline station.

The community in which Costco's new District store will be located is already oversaturated with gasoline stations. Costco plans to build its new store and gasoline station in an area called Fort Lincoln and will be located near the intersection of New York Avenue and South Dakota Avenue. Within approximately four miles of this location, there are at least forty-five (45) independent gasoline station operators in service. *See* Exhibit 4 (Map of nearby independent gas station operators). This is more than a sufficient number of stations to serve this area of the District. It would be inappropriate to grant a "special exception" to Costco to add another unnecessary and potentially hazardous gasoline station to the Fort Lincoln Community.

Conclusion

For these reasons, the IGSOA respectfully requests that the BZA deny Costco's request for a special exception to construct a gasoline station on Square 4327.

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Exhibit 1

JOHN BORN
11417 Cherry Hill Road
Beltsville, MD 20705

August 27, 2012

Mr. Clifford Moy
Secretary
Board of Zoning Adjustment
441 Fourth Street, NW
Suite 200-S
Washington, D.C. 20001

Re: BZA Case 18395 – Affidavit of John Born

Dear Mr. Moy:

I write to request participation as a witness in the Board of Zoning Adjustment Case No.: 18395 scheduled for September 11, 2012. I would like to appear as a witness for the Independent Gas Station Operators Alliance and support its opposition to Costco Corporation's request for a special exception to construct a 16-pump, 8-drive aisles gas station in the southeast portion of the Shops at Dakota Crossing development (Square 4327, Lot 5).

Since the building of the Costco Beltsville's gasoline hypermart, my gas station business has seen a 50 percent decline in the fuel volume sales. I have enclosed my affidavit as part of my testimony of the negative impact on small, independent gas station operators in DC if the action requested of the Board is approved.

I respectfully urge the Board to reject the Applicant's request for Special Exception.

Sincerely,

John Born

John M. Born

SWORN AFFIDAVIT

The undersigned swears or affirms that the foregoing statements made as part of a proceeding before the Board of Zoning Adjustment ("the Board") in BZA Case No.: 18395 and submitted to the Office of the Secretary of BZA are true and correct.

1. I am a small and independent operator of the Exxon station located at 11417 Cherry Hill Road, Beltsville, MD 20705.
2. As a co-owner, I have been operating this full-service gas station for several years.
3. My volume of sales were about 70,000 gallons per month. Since Costco was built, my sales have gone down. I am lucky to pump 35,000 gallons per month.
4. My repair bay business has also been negatively impacted by Costco and I have lost customers who think my automobile repair costs are too much because my gas prices are not as competitive as Costco.

Sign only in the presence of a Notary Public

Name of Gas Station Operator: John Born, Exxon Cherry Hill, 11417 Cherry Hill Road, Beltsville, MD.

Signature John M Born Title CO-owner

Name (please print) JOHN M. BORN

Sworn to and subscribed before me this 20 day of August 2012.

Before me personally (name of Notary Public) Varshali - Patel

(Please Print)

City of Howard County State of Maryland

Notary Signature Varshali Vijay Patel Commission expires 1-4-2015

VARSHALI VIJAY PATEL
NOTARY PUBLIC
HOWARD COUNTY, MARYLAND

manatt

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Exhibit 2

Sam Aulakh
Beltsville Exxon Gas Station
10211 Baltimore Avenue
Beltsville, MD 20705

August 27, 2012

Mr. Clifford Moy
Secretary
Board of Zoning Adjustment
441 Fourth Street, NW
Suite 200-S
Washington, D.C. 20001

Re: BZA Case 18395 – Sam Aulakh Affidavit

Dear Mr. Moy:

I write to request participation as a witness in the Board of Zoning Adjustment Case No.: 18395 scheduled for September 11, 2012. I would like to appear as a witness for the Independent Gas Station Operators Alliance and its opposition to the Costco Wholesale Corporation's Special Exception Application to construct a "mega" gas station on Square 4327, Lot 5 in the District of Columbia.

I operate an Exxon gas station near the Costco store located in Beltsville, MD. I have attached my affidavit on the negative economic impact and the loss of business the Costco gas station has brought upon my small, independent retail gas station business.

I respectfully ask the Board to deny Costco's request for approval to construct a new 16-pump gas station in Square 4327, Lot 5.

Sincerely,

Sam Aulakh

SWORN AFFIDAVIT

The undersigned swears or affirms that the foregoing statements made as part of a proceeding before the Board of Zoning Adjustment ("the Board") in BZA Case No.: 18395 and submitted to the Office of the Secretary of BZA are true and correct.

1. I operate a small and independent gasoline station located at 10211 Baltimore Avenue, Beltsville, MD 20705 (also known as Beltsville Exxon).
2. I have operating this gas station for over seven years.
3. Within the last seven years, our fuel volumes have gone down by 46 percent due to the arrival of Costco and its gas stations.
4. Two fueling site operators in Beltsville have also been displaced which reduced the number of gallons of fuel for other operators struggling to survive in the area.
5. I am concerned that the small, independent gas stations like us who operate on small profit margins and lower sales volume will be eventually put out of business because we cannot compete with large corporate hypermarts like Costco and Wawa.

Sign only in the presence of a Notary Public

Name of Gas Station Operator: Sam Aulakh, Exxon Beltsville, 10211 Baltimore Avenue, Beltsville, MD.

Signature [signature] Title G. MGR /operator

Name (please print) SHAHBAZ AULAKH

Sworn to and subscribed before me this 27 day of August 2012.

Before me personally (name of Notary Public) Michael Jay Richards

(Please Print)

County ~~City~~ of Montgomery State of Maryland

Notary Signature Michael Jay Richards Commission expires 11/9/12

200667858.1

MICHAEL JAY RICHARDS
Notary Public State of Maryland
County of Montgomery
Commission Expires November 9, 2012

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Exhibit 3

the SHOPS AT DAKOTA CROSSING

Retail Leasing and Consulting CBRE Retail 24/7.

28

Joint Venture of
Fort Lincoln New Town Corporation
Trammell Crow Company
CSG Urban Partners

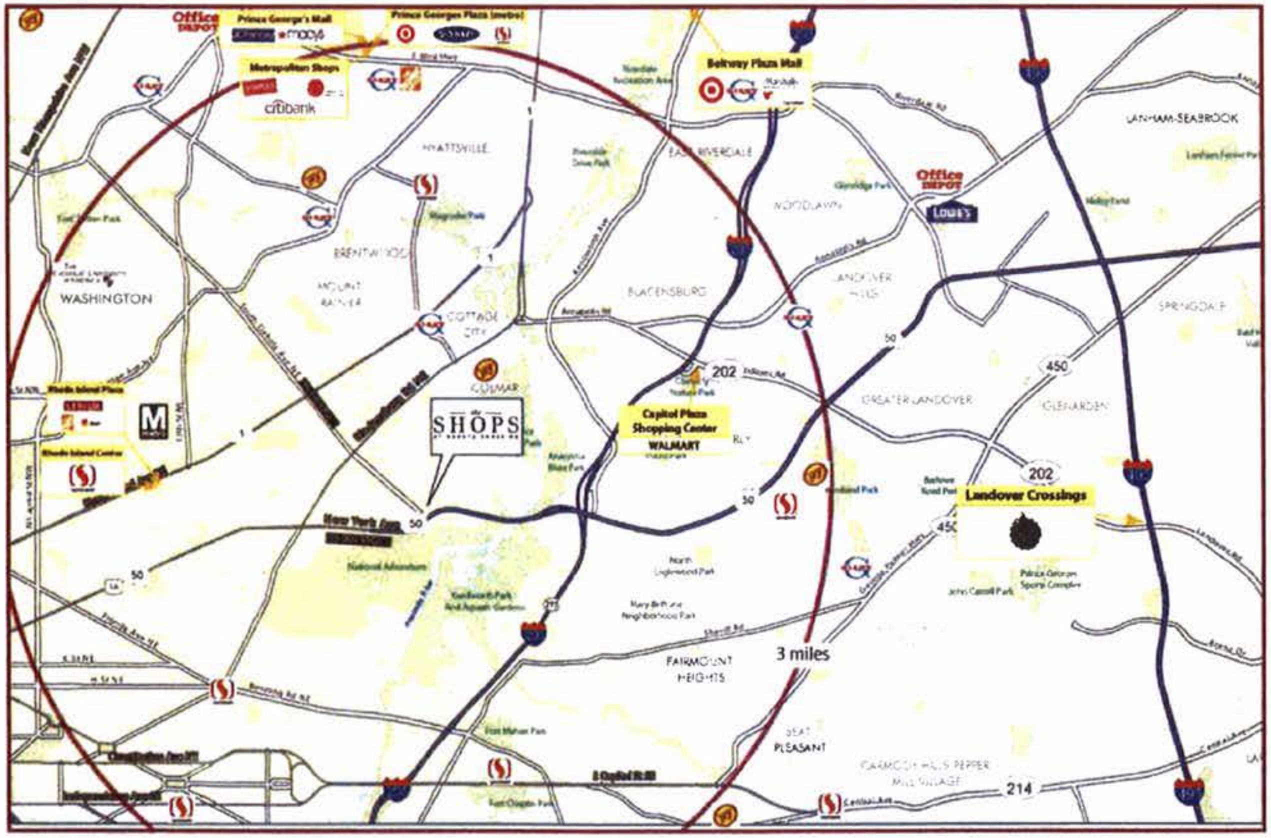
Good things come to those who wait....

Washington, DC's long anticipated retail development, The Shops at Dakota Crossing, will offer destination retail shopping to the historically underserved District neighborhoods and the adjacent Maryland suburbs. Its strategic location on New York Avenue/Route 50 at South Dakota Avenue in the northeast area of Washington, DC, provides excellent visibility and easy access to an impressive 100,000 vehicles per day. The Shops at Dakota Crossing is known as "The Gateway to Washington." Retailers will benefit from the enormous regional draw of industry leader Costco, as well as one of the area's top grocers, Shoppers Food. A strategic mix of national, regional and local retailers and restaurants will be located in the walkable "main street" area of the center with easy access to the adjacent Fort Lincoln neighborhood - one of the most vibrant and successful residential communities in the area. The Shops at Dakota Crossing's beautifully landscaped open spaces, public plazas and outdoor seating areas, as well as convenient surface parking, create the perfect blend of a highly desirable neighborhood environment with the strong regional draw of the country's top retailers.

Opening is scheduled for April 2013.

Property Description

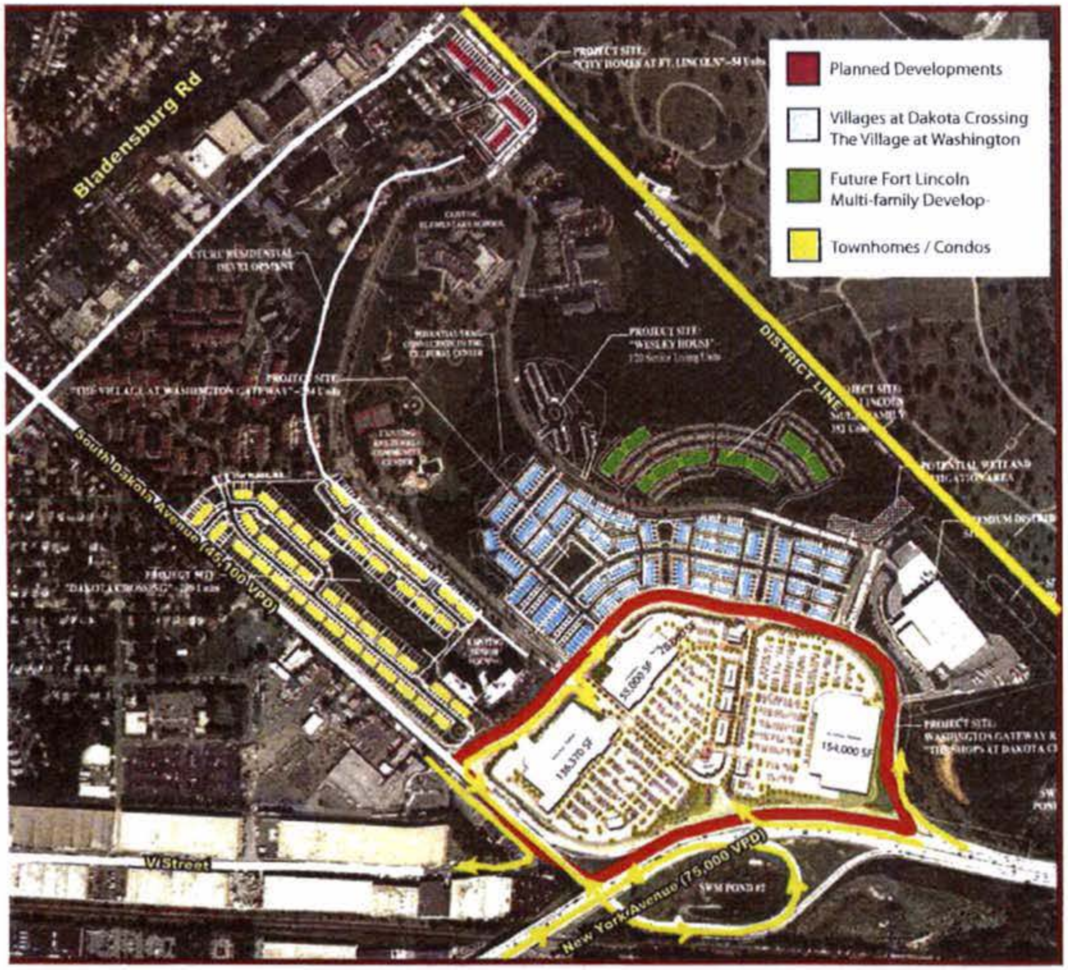
- Location: New York Avenue, NE and South Dakota Avenue, NE, Washington, DC
- Parcel Size: Approximately 42 Acres
- Anchor Tenants: Costco, Shoppers Food, Marshalls
- Building Sq. Feet: Approximately 430,000 SF; Destination big box retailers, a grocery store, restaurants and main street shops
- Parking Ratio/Type: Approximately 2,500 spaces at a ratio of 4.3 per 1,000
- Developer/Owner: Joint Venture between Fort Lincoln New Town Corporation CSG Urban Partners and Trammell Crow Company
- Construction Start: May 2011
- Estimated Delivery Date: Costco September 2012
  Shoppers, & Marshalls March 2013
  Small shop spaces deliver December 2012; April 2013 opening dates



Demographics

	1 mile	3 miles	5 miles
Population	7,231	209,621	662,350
Avg. Household Income	$52,786	$60,113	$64,090
# of Households	3,498	88,230	289,018
Daytime Population	6,021	118,701	692,385


the
SHOPS
AT DAKOTA CROSSING
Annapolis Rd
450
1
Rhode Island Ave
27,100 VPD
Capitol Plaza
Shopping Center
WALMART
Rhode Island Place
South Dakota Ave
36,900 VPD
Bladensburg Rd
27,100 VPD
SITE
33rd Pl
50
New York Ave
75,000 VPD
132,000 VPD
National
Arboretum
New York Ave
77,000 VPD
Florida Ave
H St



DAKOTA CROSSING RESIDENTIAL

(ADJACENT TO THE SHOPS AT DAKOTA CROSSING)

Existing Units: 1,478 units

Townhomes/Condos:
Dakota Crossing Sold Out (209 Units Sold and Occupied)
Avg. Sales Price: $460,000

Planned Development: Construction Start - January 2011
City Homes at Fort Lincoln
54 Townhomes
Average sales price is $400,000

Villages at Dakota Crossing: Construction Start - January 2011
334 Townhomes
Average sales price is $400,000

Future Fort Lincoln Multi-family Development: Construction Start - 2012
352 Apartment units

Buyer Profile:
$100,000 – $150,000 Avg. HH Income


Fort Lincoln Drive
33rd Street
Future
SHOPPERS
55,000 SF
(Proposed)
28,060 SF
Retail
Retail
Retail
Retail
Retail
Retail Pad
COSTCO WHOLESALE
154,000 SF
Contract Pending
136,370 SF
Bank
South Dakota
New York Avenue
N

BUILDING ELEVATIONS

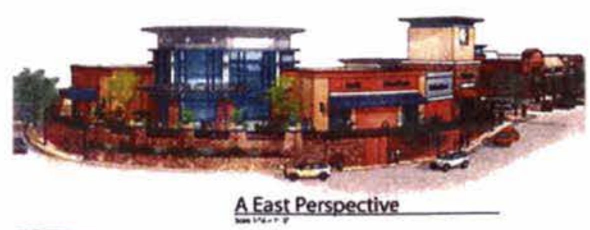
BUILDING 8

BUILDING 9

BUILDING 6

BUILDING 7

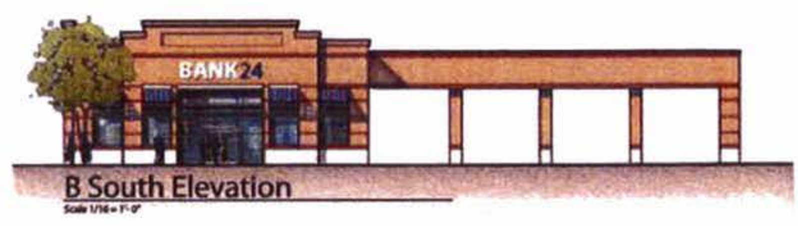
BUILDING 10

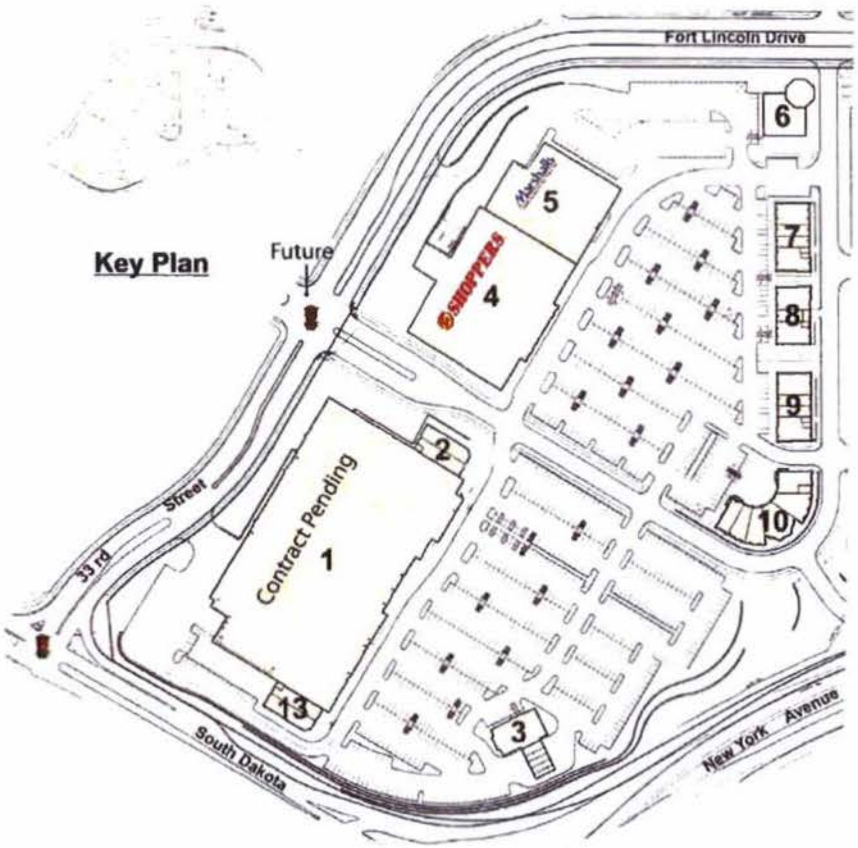



Fort Lincoln Drive
33rd Street
Grocery
Retail
Anchor Retail
Anchor Retail
6
7
8
9
10
3
South Dakota
New York Avenue

BUILDING 3


BANK24
A West Elevation
Scale 1/16 = 1'-0"


BANK24
B South Elevation
Scale 1/16 = 1'-0"



Site Plan

Tenant List

Building - 1 (Contract Pending)	136,370 SF
Building - 2	4,595 SF
Tenant 201 -	2,188 SF
Tenant 202 -	2,409 SF
Building - 3	4,500 SF
Building - 4 (Shoppers) -	55,000 SF
Building - 5 (Marshalls)	28,060 SF
Building - 6	5,000 SF
Building - 7	6,960 SF
Tenant 701 -	2,330 SF
Tenant 702 -	1,200 SF
Tenant 703 -	1,176 SF
Tenant 704 -	2,254 SF
Building - 8	5,640 SF
Tenant 801 -	2,451 SF
Tenant 802 -	995 SF
Tenant 803 -	2,194 SF
Building - 9	6,960 SF
Tenant 901 -	2,300 SF
Tenant 902 -	1,200 SF
Tenant 903 -	1,166 SF
Tenant 904 -	2,294 SF
Building - 10	12,275 SF
Tenant 1001 -	2,132 SF
Tenant 1002 -	2,439 SF
Tenant 1003 -	2,784 SF
Tenant 1004 -	1,808 SF
Tenant 1005 -	1,547 SF
Tenant 1006 -	1,565 SF
Building - 13	4,595 SF
Tenant 1301 -	2,409 SF
Tenant 1302 -	2,186 SF

LEASING & MANAGEMENT SERVICES

Retail Consulting and Leasing

CBRE Retail 24/7.

Lisa Stoddard
202.585.5519
lisa.stoddard@cbre.com

Kristen Braun
202.585.5580
kristen.braun@cbre.com

JOINT VENTURE OF
FORT LINCOLN NEW TOWN CORPORATION
TRAMMELL CROW COMPANY
CSG URBAN PARTNERS

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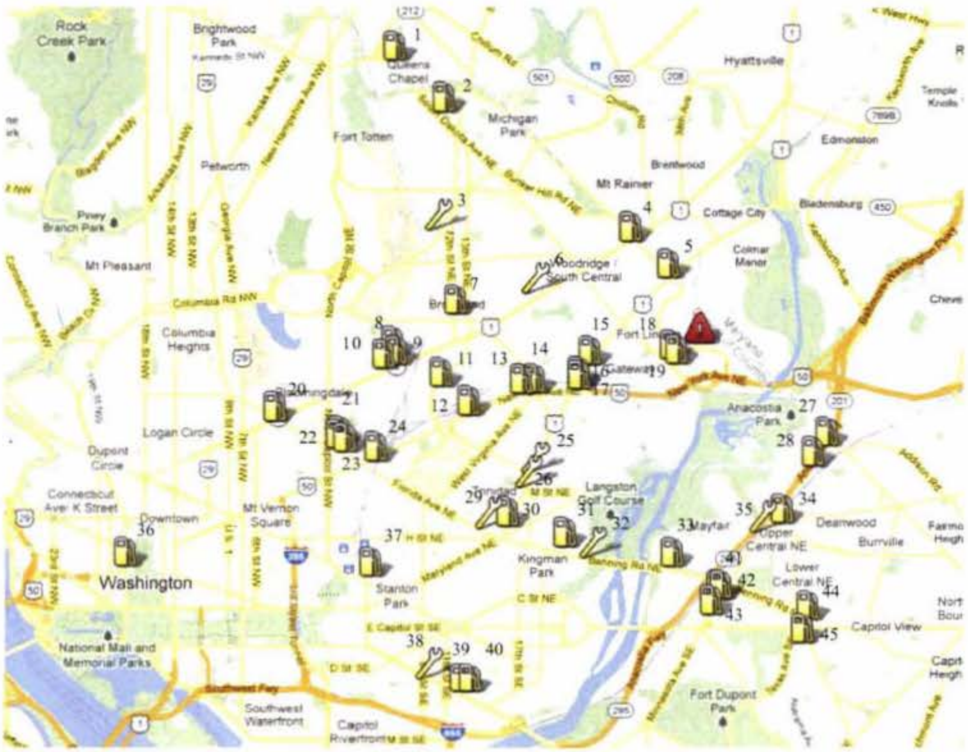
manatt | phelps | phillips

Exhibit 4

Northeast, Washington, D.C.



Indicates Gasoline & Auto Service Repair

Indicates Gasoline & Convenience Store

Proposed Costco: Fort Lincoln Drive, NE

*All information pertaining to location and distance was obtained from Google Maps.

Station List

1. 5501 South Dakota Ave. NE; 3.6 m
2. 4975 South Dakota Ave. NE; 3.1 m
3. 1020 Michigan Ave. NE; 2.7 m
4. 3101 Rhode Island Ave. NE; 1.5 m
5. 3200 Bladensburg Rd. NE; .9 m
6. 1830 Rhode Island Ave. NE; 1.8 m
7. 2800 12th St. NE; 2.3 m
8. 400 Rhode Island Ave. NE; 3.1 m
9. 420 Rhode Island Ave. NE; 3.1 m
10. 306 Rhode Island Ave. NE; 3.2 m
11. 925 Brentwood Rd. NE; 2.8 m
12. 1231 New York Ave. NE; 2.3 m
13. 1601 New York Ave. NE; 1.8 m
14. 1765 New York Ave. NE; 1.7 m
15. 2210 Bladensburg Rd. NE; 1.1 m
16. 1925 Bladensburg Rd. NE; 1.3 m
17. 2230 New York Ave. NE; 1.3 m
18. 2350 South Dakota Ave. NE; .3 m
19. 2300 South Dakota Ave. NE; .3 m
20. 1739 New Jersey Ave. NW; 4 m
21. 1 Florida Ave. NE; 3.4 m
22. 22 Florida Ave. NE 3.4 m
23. 45 Florida Ave. NE; 3.3 m
24. 101 New York Ave. NE; 3.1 m
25. 1301 Bladensburg Rd. NE; 2.1 m
26. 1201 Bladensburg Rd. NE; 2.2 m
27. 1535 Kenilworth Ave. NE; 2.3 m
28. 1329 Kenilworth Ave. NE; 2.3 m
29. 1396 Bladensburg Rd. NE; 2.8 m
30. 814 Bladensburg Rd. NE; 2.6 m
31. 1950 Benning Rd. NE; 2.9 m
32. 2651 Benning Rd. NE; 3.2 m
33. 3355 Benning Rd. NE; 3.8 m
34. 4321 Nannie Helen Burr. NE; 3.6 m
35. 4100 Hunt Pl. NE; 3.6 m
36. 1739 New York Ave. NW; 1.8 m
37. 200 Massachusetts Ave. NE; 3.8 m
38. 823 Pennsylvania Ave. SE; 4.1 m
39. 1201 Pennsylvania Ave. SE; 4.1 m
40. 1248 Pennsylvania Ave. SE; 4.1
41. 3820 Minnesota Ave. NE; 3.9 m
42. 3830 Minnesota Ave. NE; 3.9 m
43. 3710 Minnesota Ave. NE; 4.1 m
44. 4501 Benning Rd. NE; 4 m
45. 4519 Benning Rd.; 4 m