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October 9, 2012

VIA EMAIL & HAND DELIVERY

Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210S
Washington, DC 20001

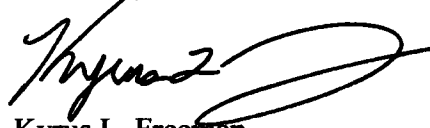
Re: Application No. 18395 - Applicant's Proposed Order

Honorable Members of the Board:

On behalf of CWC WDC LLC, the Applicant in the above-referenced case, enclosed please find one original and twenty copies of the Applicant's proposed order for this case.

Thank you for your attention to this application.

Sincerely,



Kyrus L. Freeman

Enclosure

cc: Arthur Jackson, Office of Planning (Via Hand, with enclosure)
ANC 5A (Via U.S. Mail, with enclosure)

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18395
EXHIBIT NO. 42

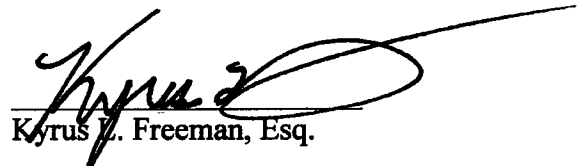
Board of Zoning Adjustment
District of Columbia
CASE NO.18395
EXHIBIT NO.42

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing by email and hand delivery on this the 9th day of October, 2012 on the following:

John Ray, Esq.
Jennifer Sincavage, Esq.
Manatt, Phelps & Phillips, LLP
700 12th Street, N.W., Suite 1100
Washington, D.C. 20005

*Counsel/Designated Representatives for the
Independent Gas Station Operators Alliance and its 34 Members*


Kyrus L. Freeman, Esq.

Application No. 18395, of CWC WDC LLC, pursuant to 11 DCMR § 3104.1, for a special exception under Sections 706, 726, and 2302 of the Zoning Regulations, to allow the construction of a new gasoline station in the C-2-B District on a portion of the premises located at 2431 Market Street, N.E. (Square 4327, Lot 5).¹

HEARING DATE: September 11, 2012

DECISION DATE: November 7, 2012

DECISION AND ORDER

This self-certified application was submitted on April 18, 2012 by CWC WDC LLC (the "Applicant"). The Applicant is the owner of the property located at 2431 Market Street, N.E. (Square 4327, Lot 5) (the "Site") in the C-2-B District. The application requests a special exception under sections 706, 726, and 2302 of the Zoning Regulations, to allow the construction of a new gasoline station in the C-2-B District on a portion of the premises located at 2431 Market Street, N.E. (Square 4327, Lot 5).

The Board of Zoning Adjustment ("BZA" or "Board") held a hearing on the application on September 11, 2012 and deliberated on the application on November 7, 2012, at which time the Board voted 4-0-1 to grant the application. A full explanation of the factual and legal basis for the Board's decision follows.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 20, 2012, the Office of Zoning ("OZ") provided notice of the filing of the application to the D.C. Office of Planning ("OP"); the D.C. Department of Transportation ("DDOT"); the Councilmember for Ward 5; Advisory Neighborhood Commission ("ANC") 5A, the ANC within which the subject property is located, and ANC Single Member District 5A-12. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the *D.C. Register*, and on June 1, 2012 sent such notice to the Applicant, ANC 5A, and all owners of property within 200 feet of the subject property.

Party Status. The Applicant and ANC 5A were automatically parties to this proceeding. There was a request for party status filed by the Independent Gas Station Operators Alliance ("IGSOA"), which is a coalition of 29 gasoline service station operators who operate a total of 34 gasoline service stations in the District of Columbia. In addition, the IGSOA submitted a Statement in Support of the IGSOA's Request for Party Status in Opposition to Case No. 18395. (Ex. 26). At the hearing, the Board accepted the IGSOA's party-status request.

Applicant's Case. Kyrus L. Freeman and Norman Glasgow, Jr., of Holland & Knight LLP, represented the Applicant. The Applicant presented four witnesses in support of the application:

¹ By letter dated September 27, 2012, the District of Columbia, Department of Consumer of Regulatory Affairs, assigned the Site a new address of 2431 Market Street, N.E. The address was previously stated in the Application as 2441 Market Street, N.E.

Renee Hanson, on behalf of the Applicant; Steven E. Sher of Holland & Knight, LLP; Jami L. Milanovich, P.E., of Wells & Associates; and Kolas Elion, of MulvannyG2 Architecture. The Board qualified as experts Mr. Sher in zoning and land use analysis and Ms. Milanovich in transportation planning and analysis.

OP Report. By memorandum dated September 4, 2012, OP recommended approval of the zoning relief requested by the Applicant, based on OP's conclusions that the application was in conformance with the criteria for granting the requested special exception requested in this case. (Ex. 29). Specifically, OP reviewed the standards under Sections 726, 706, and 2302 and found that the application met all the standards applicable to the proposed gas station under the Zoning Regulations.

DDOT Report. By memorandum dated August 31, 2012, DDOT stated that it had no objections to the approval of the proposed gas station. (Ex. 27). DDOT reviewed the impacts of the proposed gas station and found that most of the trips generated by the gas station will not be new, but instead will be vehicles already on the network for other reasons. DDOT concluded that these pass-by trips and any new trips generated by the gas station will have a "small and manageable impact on the District's roadway network." DDOT recommended approval of the application provided the trips generated by the gas station are mitigated in coordination with the planned mitigations associated with the Shops at Dakota Crossing, currently under construction. Specifically, DDOT recommended that mitigation measures at the intersections of 33rd Place/South Dakota Ave and 33rd Place/Fort Lincoln Drive be incorporated into the design and signal timing of the intersections. As stated in the supplemental memorandum in response to the DDOT report, the Applicant will work with DDOT during the permitting process to ensure that the time adjustments at the intersections are incorporated into the larger signal adjustments being made in conjunction with the approved retail center.

DDOT found that there was adequate access to the gas station area from the two full-access intersections proposed with the approved Shops at Dakota Crossing. Furthermore, all delivery trucks would be able to turnaround on-site, which is the DDOT's preference. DDOT agreed with the Applicant's overall approach to estimating the roadway impact of the proposed gas station. DDOT found that the Applicant's method of using case studies for unique land uses, such as club member-only gas stations, is the preferred method over employing the industry standard Institute of Transportation Engineers (ITE) *Trip Generation Manual*. DDOT noted that the trip generation rates used by the Applicant were even *higher* than those found in the ITE *Trip Generation Manual*. Moreover, the Applicant did not take any trip reduction credit for the fact that the gas station is replacing a undesignated pad site which would have been part of the Shops at Dakota Crossing. DDOT concluded that it is in agreement with the Applicant's conservative approach to estimating the traffic impact of the proposed gas service station.

ANC Report. By letter dated August 31, 2012, Robert L. King, the ANC Commissioner for ANC 5A-12, the Single Member District in which the Site is located, submitted a letter requesting a waiver from the requirement to file testimony seven days in advance of the hearing

and for permission to submit his testimony at the hearing. (Ex. 28). Commissioner King made this request because there was an emergency Single Member District 5A-12 meeting on the gas station application scheduled for September 10, 2012. At the hearing, Commissioner King, testified in his capacity as the Single Member District Commissioner for the Site. Commissioner King stated that the ANC held a meeting on September 10, 2012. At the meeting a motion was passed by a vote 75 to 31 in support of the proposed gas station. Furthermore, on September 26, 2012, ANC 5A held a regularly scheduled public meeting at which notice was properly given and a quorum was present. The ANC 5A voted 6-3-1 to support the proposed gas service station. (Ex. ____)

Persons and Organization in Support. The Board received a letter in support of the application from the Deputy Mayor for Planning and Economic Development ("DMPED"). (Ex. 35). The DMPED recommended that the proposed gas station be approved as expeditiously as possible so that development of the proposed gas station can move forward as soon as possible. The DMPED stated that the District of Columbia has worked closely with the Applicant and other proposed retailers for the Dakota Crossings project. In fact, the District has a vested interest in seeing the site developed because it issued TIF bonds to fund the infrastructure of a number of the proposed facilities. The DMPED further stated that there would be significant benefits from the proposed gas station, including the ability of residents of the community that are members to take advantage of significant savings by being able to purchase gas more cheaply, the generation of new jobs, and tax revenue estimated at over \$2 million per year for the city. DMPED further stated that the proposed gas station use does not appear to create any objectionable conditions given that the gasoline service station: includes substantial space for car queuing and by-pass lanes on-site; is a significant distance from any residential uses; is adequately landscaped and screened; and utilizes state-of-the-art safety and environmental features.

Persons and Organization in Opposition. The Board also received testimony and statements in opposition to the application. The Independent Gas Station Operators Alliance ("IGSOA") opposed the request for a special exception to construct a gasoline service station because it argued that: (1) the proposed station violates Section 25-313(d), an Alcoholic Board Control ("ABC") Board law, prohibiting establishments from selling both motor vehicle gasoline and alcohol; (2) the application for the special exception, and its accompanying traffic study is flawed and unreliable; (3) the proposed gasoline station is harmful to the community and the environment and inappropriate for The Shops at Dakota Crossing Shopping Center; (4) the Applicant fails to offer any supporting evidence and/or empirical data that there is a need for another gasoline station in this area of the district; and (5) the application should be denied because even if the applicant meets the requirements of the applicable Zoning Regulations, Section 101.4(d) of the Zoning Regulations states that when a higher standard is imposed under any D.C. law that standard should govern, and the applicant cannot meet the higher standards set forth under other D.C. laws, such as Section 25-313(d). (See Exhs. 25, 26, 31, and 32).

Request for Recusal. John Ray, counsel for IGSOA submitted a letter to the OZ, dated September 11, 2011, requesting that Chairperson Lloyd Jordan recuse himself from the matter. (Ex. 34).

The request for recusal was based on the fact that Chairperson Jordan was employed by the Applicant's legal counsel, Holland & Knight, LLP ("H&K") from approximately 2000 to 2008, and that H&K was first retained as the Applicant's legal counsel as early as 2005. At the hearing, Chairperson Jordan stated that he did not intend to recuse himself because there was no reasonable basis to conclude that he had a conflict of interest. Chairperson Jordan stated that he left H&K a number of years ago, he has no personal or financial interest in the firm, and that H&K was not a party in the matter. Moreover, he stated that the Board has previously had cases before it in which H&K represented one of the parties, and in those cases he has been fair and balanced and made decisions based on the merits of the case. Furthermore, Vice-Chair Sorg stated that she had previously seen Chairperson Jordan fairly and justly analyze and deliberate over cases in which H&K has served as counsel. Moreover, Commissioner Turnball stated that he was very confident in the Chairperson's abilities to deliberate fairly on the case. (*See* Hearing Transcript, pp. 199-202). Thus, the request for recusal was denied.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The Site is located at 2431 Market Street, N.E. in Square 4327, Lot 5.
2. Square 4327 is located in the northeast quadrant of the District of Columbia and is generally bound by Fort Lincoln Drive, N.E., New York Avenue, N.E., South Dakota Avenue, N.E., and 33rd Place, N.E.
3. The lot is generally rectangular with an extension to New York Avenue. The lot has frontage of approximately 20 feet on New York Avenue and approximately 435 feet on Market Street.
4. The Site contains approximately 93,598 square feet of land area, and is currently unimproved.
5. The Site is located within the C-2-B District.
6. A gasoline service station is permitted in a C-2-B District as a special exception if approved by the Board under Section 3104, subject to the provisions of Section 706 and Chapter 23 of the Zoning Regulations. (11 DCMR § 726.1).

The Applicant's Project

7. The Applicant proposes to construct a gasoline service station on the Site.
8. The gasoline service station will include 16 pumps and 8 drive aisles. Other than the pumps, a 44 square foot controller enclosure and a pump island canopy, there will be no other above-grade structures or uses constructed on the Site.

The Zoning Relief Requested

Special Exception

9. The Applicant is seeking a special exception under Sections 706, 726, and 2302 of the Zoning Regulations to allow the construction of a new gasoline station in the C-2-B District on a portion of the premises located at 2431 Market Street, N.E. (Square 4327, Lot 5).
10. Under Section 726.1 of the Zoning Regulations, a gasoline service station is permitted in the C-2 District as a special exception if approved by the Board under Section 3104, subject to the provisions of Section 706 and Chapter 23 of the Zoning Regulations.
11. Section 706.1 of the Zoning Regulations requires that a gasoline service station established or enlarged after May 12, 1958 shall be permitted in a C-1 District as a special exception if approved by the Board under §3104, subject to the provisions of chapter 23 of this title and the provisions of this section.

Distance from Residence District

12. The proposed gas station meets the standards for special exception approval.
13. Section 706.3 requires that a station shall not be located within 25 feet of a Residence District unless separated from the Residence District by a street or alley.
14. The proposed gas station will not be within 25 feet of a Residence District.

Traffic Conditions

15. Section 706.4 requires that the operation of the use shall not create dangerous or other objectionable traffic conditions.
16. The Board accepts the findings made in the Wells & Associates traffic study (the "Wells Report") submitted by the Applicant (Ex. 24, Ex. D) and at the hearing presentation (Ex. 36) that the operation and use of the proposed gasoline service station on the Site will not create dangerous or other objectionable traffic conditions.
17. The gasoline service station can only be used by members which will minimize the number of trips typically associated with a gasoline service use.
18. The proposed development is anticipated to generate an nominal amount of traffic, with just 20 new AM peak hour vehicular trips and just 26 new PM peak hour vehicular trips.

19. The traffic associated with the proposed development will have a negligible impact on the surrounding intersections.
20. The proposed gas station use will not, in and of itself, require improvements to be made at any of the study intersections.

Requirements to Protect Nearby Property

21. Section 706.5 of the Zoning Regulations provides that the Board may impose requirements pertaining to design, appearance, screening, or lighting or other requirements it deems necessary to protect adjacent or nearby property.
22. The gasoline service station has been sited and designed to minimize any impacts.
23. The Site is surrounded by commercial uses to the north and east and by New York Avenue, N.E. and South Dakota Avenue, N.E. to the south.
24. The closest residential users are approximately 965 feet away from the Site.
25. The Applicant will be installing a landscape buffer along the southern portion of the Site.
26. The gasoline service station will include numerous state-of-the-art safety features, as set forth in the Barghausen Consulting Engineers, Inc. memorandum (Ex. 24, Ex. E), including:
 - an on-site attendant at all times that the station is open to assist the customers and monitor the operations for safety and security;
 - fuel dispenser safety devices, including automatic shutoff shear valves; nozzle breakaway devices; internal fire extinguishers; and liquid leak detectors that are 30 times more sensitive than required by Federal regulations;
 - petroleum tanks with double-walled fiberglass and a hydrostatic monitoring system that exceeds current Federal leak detection monitoring requirements and monitors changes in liquid level of the tank's secondary containment;
 - a monitoring system which includes visual/audible alarms and which shuts down the entire system in case of power failure or leak;
 - an alarm system monitored by an independent security company in addition to on-site audible and visual alarm notifications;

- emergency shutdown stations through the site per fire code requirements;
- dispenser sumps installed under each dispenser and also monitored with a probe that detects liquid, and which will also shut the system down if liquid is detected;
- the inclusion of a fire suppression system in the sump that is activated if a fire ever occurs;
- the fill and vapor connections at the tanks utilize spill buckets to capture any potential product leakage from the tanker disconnect; and
- an advanced vapor recovery system that includes air pollution control equipment for the filling of the gas tanks by tanker trucks and at the fueling dispensers for customer fueling.

27. The Site has down lighting that will be contained on the Site with no spill-over to residential or other properties.

Parking

28. Section 706.6 of the Zoning Regulations provides that required parking spaces may be arranged so that all spaces are not accessible at all times. All parking spaces provided under this subsection must be designed and operated so that sufficient access and maneuvering space is available to permit the parking and removal of any vehicles without moving any other vehicle onto public space.

29. Section 2101.1 of the Zoning Regulations provides that a gasoline service station in all zone districts is required to provide one off-street parking space for each 300 square feet of gross floor area, excluding any pump island canopy and any kiosk adjacent to the pumps used exclusively as an attendant's shelter.

30. The only structure proposed on the Site is a 44 square foot controller enclosure.

31. The area under the proposed pump island canopy is explicitly excluded from the parking calculation. Thus, there are no required parking spaces for this gasoline service station.

Applicable Standards under 2302

32. Section 2302.1 of the Zoning Regulations requires that a public storage garage, repair garage, mechanical parking garage, or gasoline service station established or enlarged in any district except in the C-M or M Districts shall be subject to the provisions in Section 2302. This application meets the standards in Section 2302 for special exception approval as described below.

Distance from a Residence District

33. Section 2302.2 of the Zoning Regulations requires that no portion of the structure or premises be located within 25 feet of a Residence District unless separated from that Residence District by a street or alley. The Site is located in the C-2-B District and the properties located 25 feet to the immediate north, south, east and west of the Site are also located in the C-2-B District. The proposed station will not be located within 25 feet of a Residence District, and thus meets this requirement.
34. Section 2302.3 of the Zoning Regulations requires that the proposed gas station shall not have a vehicular entrance or exit connected with a street at a point closer than 25 feet to any Residence District existing at the time the use is established, unless separated from the Residence District by a street or alley. The nearest residential zone district and residential uses to the Site are over 965 feet away. The vehicular entrance and exit for the proposed gasoline service station connects with a street that is adjacent to properties zoned C-2-B. Thus, the application meets this requirement.

Distance from Driveway to an Intersection

35. Section 2302.4 of the Zoning Regulations requires that no driveway of any entrance or exit to any use listed in § 2302.1 shall be closer than forty 40 feet to a street intersection as measured from the intersection of the curb lines extended.
36. The vehicular entrance and exit for the proposed gasoline service station is approximately 325 feet from the nearest intersection, and thus the application complies with this provision.

Grease Pits or Hoists

37. Section 2302.5 requires that all grease pits or hoists constructed or established shall be within a building. The project does not include any grease pits or grease hoists.

Issues Raised by Parties in Opposition

38. As indicated in testimony and statements, included as Exhibits 25, 26, 31, and 32, in the record of this case, the IGSOA and a number of individuals raised concerns including traffic issues, economic competition, and the safety and environmental impact of the proposed gas service station.
39. During the hearing, the IGSOA presented expert testimony from Joe Mehra, President, MCV Associates, Inc. His resume was submitted to the Board. (See Ex. 33). Mr. Mehra testified that he had reviewed the Wells Report. Mr. Mehra stated that the traffic study

contained errors and was flawed because the study did not address the safety of the traffic conditions both before and after the proposed gas station would be in operation. (*See* Hearing Transcript, pp. 295-303).

40. The IGSOA also presented testimony from Mahboob "Tony" Ahmed, Mostafa Sadegh, Petros Kiflu, and Alexander Anenia, operators of gas stations in northeast Washington, D.C. and members of IGSOA, who all testified regarding the economic competition that would result from the proposed gas station.
41. The Board has carefully reviewed the statements and testimony presented by the IGSOA and considered each of the points both in writing and orally at the public hearing, and makes the following findings:

- a. The IGSOA asserts that D.C. Code § 25-313(d) prohibits the Applicant from simultaneously operating a gasoline station and holding an alcohol beverage license.

The Board finds that it is without jurisdiction to consider the IGSOA's assertion that the Applicant has violated D.C. Code § 25-313(d). The Board's jurisdiction is defined by statute and regulation. (*See* D.C. Code § 6-641.07; 11 DCMR §§ 3100 *et seq.*). The Board's authority is limited to, and controlled by, its enabling statute and governing regulations, and neither of those documents permits the Board to deny a special exception based on an alcohol beverage license issue. Any question as to whether an alcohol beverage license is appropriate is in the exclusive domain of the ABC Board, pursuant to D.C. Code § 25-104. Furthermore, the Applicant will not be selling alcohol at the gasoline service station. Therefore, the Applicant does not hold, and has never attempted to obtain, an alcohol license. Here, the Board finds that the Applicant meets the applicable regulatory criteria for a special exception under the Zoning Regulations.

- b. IGSOA asserts that the application for the proposed gas station, and the supporting traffic study, is flawed and fails to meet the requirements of the relevant Zoning Regulations.

The Board finds that the Wells Report is based on reliable principles and methods and establishes that the proposed gas station will not adversely impact local traffic. (Ex. 24, Ex. D). The Wells Report confirms that the operation and use of the proposed gasoline station will not create dangerous or other objectionable traffic conditions because (i) the gasoline station has been designed to provide queuing on the Site for 56 vehicles; (ii) the station includes 22-foot drive aisles and 9-foot bypass lanes, both of which provide ample space for cars to leave the queue lanes if necessary; and (iii) the gasoline service station can only be used by members, which will minimize the number of trips typically associated with a gasoline service use.

The Board further finds that the Wells Report makes clear that (i) the proposed gasoline station is anticipated to generate a nominal amount of new traffic, with just 20 new A.M. peak hour vehicular trips and just 26 new P.M. peak hour vehicular trips; (ii) traffic associated with the proposed gasoline station will have a negligible impact on the surrounding intersections; and (iii) the proposed traffic signal at the 33rd Place/Fort Lincoln Drive/Site Driveway intersection would adequately accommodate the additional traffic associated with the gasoline pumps.

Moreover, the Board finds that the Wells Report is not flawed. First, the Wells Report properly formulates the site trip generation (*i.e.* "new trips," "internal trips" and "pass-by trips") for the proposed gas service station. In fact, the baseline trip generation used in the Wells Report was higher than those found in the ITE *Trip Generation Manual*. Second, given the Applicant's proposed gas facility is a unique use as a members-only station, Wells & Associates also evaluated trip generation data for several similar gas facilities already in operation. The sites included members-only gas service stations in (i) Sterling, Virginia; (ii) Leesburg, Virginia; and (iii) Barrie, Ontario. These were relevant in that they are multi-pump gas facilities similar in terms of size and surrounding uses as that of the proposed Applicant. DDOT stated that Wells & Associates used a conservative approach and noted that the Applicant did not take any trip reduction credit for the fact that the gas station is replacing a proposed undesignated pad site that would have been part of the larger Shops at Dakota Crossing. Furthermore, the Board finds that the Wells Report properly evaluates the impact of vehicular traffic generated by other entities located at The Shops at Dakota Crossing shopping center. The Wells Report states that the traffic associated with the (i) The Shops at Dakota Crossing, which includes the shopping center, the Costco store, and the grocery store; (ii) Villages at Dakota Crossing; (iii) Fort Lincoln Multi-Family; and (iv) City Homes at Fort Lincoln were included, and accounted for, in the background traffic forecasts. (Ex. 24, Ex. D).

The Board finds that the Applicant is committed to working with DDOT and other stakeholders throughout the process to ensure that any trips generated by the proposed gas service station are appropriately mitigated in coordination with planned traffic mitigation measures for The Shops at Dakota Crossing, as stated in the Wells & Associates supplemental memorandum dated September 5, 2012.

c. IGSOA asserts that the proposed gasoline service station is unnecessary and would be harmful to the community and the environment. The IGSOA contends that the proposed gasoline service station will put independent gasoline station owners out of business and discourage potential small business owners from investing in the District. Moreover, the IGSOA asserts that there is no "need" for another gasoline service station in the Fort Lincoln area.

The Board finds that IGSOA's economic harm claims are not properly considered on an application for a special exception and are not a sufficient basis to deny an application. First, the Board must make its decision on a special exception for a gasoline service station in a C-2 District based on fixed criteria set out in the Zoning Regulations. (*See* 11 DCMR §§ 706 *et seq.*; 2302 *et seq.*) The Board finds that the purported impact of a special exception on the marketplace or whether there is a "need" for the proposed use is not part of the calculus. In accordance with the Zoning Regulations, the Board and courts across the country have rejected similar "economic competition" arguments, holding that they are an improper basis on which to deny a special-exception application. *E.g., Application No. 13384 of Towers Condominium Association* (Dec. 3, 1980). In the *Towers Condominium* case, the Board held that unfair competition arguments were "not persuasive to require denial of the application" and that "[e]conomic competition is not a proper argument for denial of an application." *Application No. 13384 of Towers Condominium Association* (Dec. 3, 1980) at 3 (emphasis added). In addition, as stated in the letter of support issued by the DMPED, the approval of the proposed gas station will enable residents that are members to take advantage of a significant savings by being able to purchase gas more cheaply, will generate new jobs, and will result in an estimated \$2 million dollars in tax revenue for the District. Accordingly, the Board finds that the fact that proposed gas station could potentially result in increased economic competition for existing service stations is not a factor that should be considered and is not grounds to deny.

The Board further finds that the proposed gas service station is not harmful to the environment. The proposed gas service station will include state-of-the-art environmental and safety features, including, but not limited to: (a) the industry's best available petroleum handling system, which exceeds federal, state and local requirements for pollution prevention and fire safety; (b) Phase I Enhanced Vapor Recovery (EVR) equipment to prevent air pollution while the gas tanks are filled by tanker trucks; (c) Phase II EVR equipment to prevent air pollution at fueling dispensers for customer fueling; (d) an onsite monitoring system that includes visual/audible alarms that will immediately shut down the entire system in the event of a power failure or the unlikely event of a leak; (e) a 24/7 offsite alarm system that is monitored by an independent security company (f) emergency shutdown stations throughout the Site in accordance with fire code requirements; (g) Extensive fire suppression systems throughout the Site, including at each of the dispenser sumps, and additional voluntary fire protection at dispenser and tank sumps; and (h) employees trained on how to inspect the islands and identify maintenance requirements. (Ex. 24, Ex. E). Moreover, the applicant will have to comply with a rigorous permit review process through a number of District agencies, including the D.C. Department of the Environment, that will review all applicable environmental and safety concerns during the permitting process.

d. IGSOA asserts that the application should be denied because Section 101.4(d) of the Zoning Regulations states that when a higher standard is imposed under any DC law, that standard should govern, and the applicant cannot meet the higher standards set forth under other DC laws.

The Board finds that Section 101.4(d) does not apply any greater standard for the Board to consider when determining whether to approve an application for a special exception. Instead, Section 101.4(d) requires that the Applicant must satisfy the most restrictive requirements necessary for all of the permits and approvals needed in order to operate the proposed gas service station. For example, the Applicant must meet rigorous environmental and safety standards during the permitting process by the DC Department of the Environment. Those regulations will be imposed by the applicable agency and are not within the jurisdiction of the Board. The Board finds that Applicant has satisfied the specific regulatory requirements for a special exception which are subject to the Board's jurisdiction.

e. IGSOA asserts that the report submitted to the Board by OP is incomplete and fails to discuss the negative impacts of the proposed gas station.

The Board finds that the OP report properly considered the standards for approval of a special exception to authorize a gas service station in accordance with §§ 706, 726, and 2302 of the Zoning Regulations. OP considered each of the applicable standards in detail and found that the applicant meets the requirements for a special exception. Moreover, OP attended a meeting of ANC 5A and carefully considered the concerns of the residents regarding potential safety, light spillage, and traffic impacts before making its report. Therefore, the Board finds that the OP report is complete and reliable.

42. At the hearing, some of the witnesses in opposition to the application referenced the proposed gas service station by Costco in Wheaton, MD. In 2012, Costco filed an application for a gas station in Wheaton, MD. A number of residents objected to the gas station based on the gas station's distance to a community center. In this case, the separation between the gas station and the nearest residences in this case is over 900 feet away, much further than the proposed gas station in Wheaton. In fact, the Board finds that the proposed gas station is 965 feet away from the nearest residence; 2,850 feet away from the nearest elementary school; 2,310 feet away from the nearest community pool; and 2,315 feet away from the nearest day care/recreation center.

CONCLUSIONS OF LAW

Special Exception

Standard of Review

Relief granted through a special exception is presumed appropriate, reasonable and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, "[t]he Board's discretion ... is limited to a determination of whether the exception sought meets the requirements of the regulations." *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

Pursuant to Section 726.1 of the Zoning Regulations, a gasoline service station is permitted in a C-2 District as a special exception if approved by the Board of Zoning Adjustment under Section 3104, subject to the provisions of Section 706 and Chapter 23 of the Zoning Regulations. The Applicant is seeking a special exception under Sections 706, 726, and 2302 of the Zoning Regulations, to allow the construction of a new gasoline station in the C-2-B District on a portion of the Site. The Board concludes that the Applicant complies with the special exception standards as follows:

Section 706.1 - A gasoline service station established or enlarged after May 12, 1958, shall be permitted in a C-1 District as a special exception if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of chapter 23 of this title and the provisions of this section.

This provision is a statement of the standards by which the application must be reviewed. The Board concludes that the Applicant meets these standards as follows.

Section 706.3 - The station shall not be located within twenty-five feet (25 ft.) of a Residence District unless separated from the Residence District by a street or alley.

The Site is located in the C-2-B District and the properties located to the immediate north, south, east, and west of the Site are located in the C-2-B District. Therefore, the Board concludes that the proposed gas station will not be located within 25 feet of a Residence District and the application therefore complies with this provision.

Section 706.4 - The operation of the use shall not create dangerous or other objectionable traffic conditions.

The Board concludes that the operation and use of the proposed gasoline station on the Site will not create dangerous or other objectionable traffic conditions for the reasons set forth above.

Section 706.5 - The Board may impose requirements pertaining to design, appearance, screening, or lighting, or other requirements it deems necessary to protect adjacent or nearby property.

The Board concludes that in this case, the gasoline service station has been sited and designed to minimize any impacts. The Site is surrounded by commercial uses to the north and east, and by New York Avenue, N.E. and South Dakota Avenue, N.E. to the south. The closest residential uses are approximately 965 feet away. As shown on the Site plan included with the application, the Applicant will be installing a landscape buffer along the southern portion of the Site. In addition, the Board concludes that, as indicated in the Fuel System Features memorandum prepared by Barghausen Consulting Engineers, Inc. (Ex. 24, Ex. E), the proposed gas service station will include numerous, state-of-the-art safety features. Therefore, the Board concludes that there is no need to impose any conditions regarding design, appearance, screening or light in this case.

Section 706.6 - Required parking spaces may be arranged so that all spaces are not accessible at all times. All parking spaces provided under this subsection shall be designed and operated so that sufficient access and maneuvering space is available to permit the parking and removal of any vehicles without moving any other vehicle onto public space.

The Board concludes that the proposed gas station complies with this provision. Section 2101.1 of the Zoning Regulations requires that a gasoline service station in all zone districts is required to provide one off-street parking space for each 300 square feet of gross floor area, excluding any pump island canopy and any kiosk adjacent to the pumps used exclusively as an attendant's shelter. In this case, the only structure proposed is a 44 square foot controller enclosure, adjacent to pumps and to be used exclusively by an attendant. Furthermore, the area under the proposed pump island is explicitly excluded from the parking calculation. Therefore, the Board concludes that there are no required parking spaces for this gasoline service station.

Section 2302.1 - A public storage garage, repair garage, mechanical parking garage, or gasoline service station established or enlarged in any district except in the C-M or M Districts shall be subject to the provisions in this section.

This provision is a statement of the standards by which this application must be reviewed. The Board concludes that the proposed station meets the standards in the provisions of this Section.

Section 2302.2 - No portion of the structure or premises to be used for any of the uses listed in § 2302.1 shall be located within twenty-five feet (25 ft.) of a Residence District unless separated from that Residence District by a street or alley.

The Board concludes that the proposed gas station will not be located within 25 feet of a Residence District, and therefore, the station complies with this provision. The Site is located in the C-2-B District and properties located 25 feet to the immediate north, south, east and west of the Site are also located in the C-2-B District.

Section 2302.3 - No use listed in § 2302.1 shall have a vehicular entrance or exit connected with a street at a point closer than twenty-five feet (25 ft.) to any Residence District existing at the time the use is established, unless separated from the Residence District by a street or alley.

The Board concludes the proposed gas station complies with this provision because the nearest residential zone district and residential uses to the Site are over 965 feet away. Furthermore, the vehicular entrance and exit for the proposed gasoline station connects with a street that is adjacent to properties zoned C-2-B.

Section 2302.4 - No driveway of any entrance or exit to any use listed in § 2302.1 shall be closer than forty feet (40 ft.) to a street intersection as measured from the intersection of the curb lines extended.

The Board concludes that the vehicular entrance and exit for the proposed gasoline service station is approximately 325 feet from the nearest intersection. Therefore, the proposed station complies with this provision.

Great Weight

Section 13(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Code § 1-309.10(d)(A)), requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 5A recommended approval of the proposed gas service station. (Ex. __). For the reasons stated above, the Board found the ANC's advice to be persuasive. Having identified the ANC's issues and concerns and explained why it found the advice to be persuasive, the Board gave the ANC's written recommendations the great weight to which they were entitled.

The Board is required under Section 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Code § 6-623.04) to give great weight to OP recommendations. The Board concurs with OP's recommendation that the zoning relief should be granted.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof for

special exception relief, pursuant to 11 DCMR §§ 3104.1, 411.11, and 1902.1(a), and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Accordingly, it is therefore **ORDERED** that the application is hereby **GRANTED SUBJECT** to the approved plans, as shown on Exhibit 24, Exhibit C.

VOTE: 4-0-1 (Nicole C. Sorg, Michael G. Turnbull, Lloyd L. Jordan, and Jeffrey L. Hinkle to Approve; a mayoral appointee, not voting, not having participated in the case)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

ATTESTED BY:

SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

UNDER 11 DCMR § 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL BECOME EFFECTIVE UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (THE "ACT"), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment**

BZA APPLICATION NO. 18395

As Director of the Office of Zoning, I hereby certify and attest that on _____, 2012, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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ATTESTED BY:

SARA A. BARDIN
Director, Office of Zoning