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To:	Chairperson Lloyd Jordan and Members D.C. Board of Zoning Adjustment
From:	John Ray Jennifer Sincavage Howard H. Yuan Counsel to the Independent Gas Station Operators Alliance
Date:	October 9, 2012
Subject:	Findings of Fact and Conclusions of Law

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

HEARING DATE: September 11, 2012
DECISION DATE: November 7, 2012

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. On June 1, 2012, the Board notified ANC 5A of the September 11, 2012 public hearing for the Application. On the same day, the Board verified and attested that letters of notice had been sent to owners of property within 200 feet of the subject property. On August 23, 2012, the Applicant certified that the BZA Public Notice of the September 11, 2012 hearing had been posted on the street frontages of the subject property.

Request for Party Status. The Independent Gas Station Operators Alliance (the "IGSOA"), a coalition of 29 gasoline service station operators who operate a total of 34 gasoline service stations within 4.5 miles of Costco's propose gasoline station, requested party status in opposition to the application. The IGSOA was represented by John Ray of Manatt, Phelps, and Phillips. The Board granted party status to the IGSOA.

Applicant's Case. Kyrus Freeman of Holland & Knight, LLP represented the Applicant. The Applicant presented three witnesses in support of the application: Renee Hanson of Costco Wholesale Corporation, representing the Applicant; Jami Milanovich, Wells & Associates; Steven E. Sher, Director of Zoning and Land Use Services at Holland & Knight, LLP. The

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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18395
EXHIBIT NO. 44

Board of Zoning Adjustment
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Board qualified Ms. Milanovich as an expert in transportation and Mr. Sher as an expert in planning.

Government Reports. The District Department of Transportation filed a report with the Board on August 31, 2012 with no objection to Costco's special exception request, "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." DDOT Report at 1. These mitigations were necessary to compensate for "additional trips generated by the proposed gas station" and the insufficient queue lengths at the "southbound left-turn lane of 33rd place at South Dakota Ave, . . ." *Id.* at 3. On September 4, 2012, the Office of Planning filed a report with the Board, recommending the approval of Costco's special exception request. Of note, the report stated that the applicant was "Costco Wholesale Corporation", not CWC WDC LLC. Finally, on September 10, 2012, the Deputy Mayor for Planning and Economic Development filed a letter with the Board, supporting Costco's application.

ANC Report. At the time of the September 11, 2012 hearing (the "Hearing"), ANC 5A failed to submit a report to the Board in violation of § 3115.1 of the D.C. Zoning Regulations.

Party Opposition. The IGSOA was the only party in opposition to Costco's application for special exception. The IGSOA presented 5 witnesses in opposition to the application: Joe Mehra, MCV Associates, Inc.; Mahboob "Tony" Ahmed, IGSOA; Mostafa Sadegh, IGSOA; Petros Kiflu, IGSOA; and Alexander Anenia, IGSOA. The Board qualified Mr. Mehra as an expert in transportation.

Persons in Support or Opposition. ANC Commissioner Robert King, as an individual and not in his capacity as an ANC commissioner, spoke in support of Costco's request for special exception. Five individuals from the community spoke in opposition to the Costco's application: Gloria Stokes, Fort Lincoln resident; Michael Williams; Stephen Bota, owner of 2 District gasoline stations; Franklin Wilds, former ANC Commissioner and D.C. Chairman; and Mark Jones, Ward 5 State Board of Education Member and Vice-President of the State Board of Education; Natalie Ford, Fort Lincoln resident.

FINDINGS OF FACT

The Site and Surrounding Neighborhood

1. The Site is located at Lot 5 in Square 4327. Square 4327 is located in the Northeast section of the District and is generally surrounded by four streets: 1) Fort Lincoln Drive, N.E.; 2) New York Avenue, N.E.; 3) South Dakota Avenue, N.E.; and 4) 33rd Place, N.E. *See* Applicant's Prehearing Submission at 2.

2. Lot 5 is part of the planned "The Shops at Dakota Crossing" ("Dakota Crossing") shopping center. Other businesses located at the Dakota Crossing shopping center include a Shoppers Food grocery store and a Marshalls retail store. The shopping center will also contain various other retail stores and restaurants.

3. The Site is located in the Fort Lincoln community, which is primarily a residential area. Additionally, the community contains multiple senior citizen residences, the Thurgood Marshall Elementary School, the Fort Lincoln Recreation Center, the Theodore Hagans Cultural Center senior center, and the Dakota Playground.

4. The Site is zoned as C-2-B. C-2-B Districts are generally "designated to serve commercial and residential functions . . . with higher density residential and mixed uses." 11 D.C.M.R. § 720.6. Gasoline service stations are not permitted as a matter of right in C-2-B Districts. *See* 11 D.C.M.R. § 721. To construct a gasoline service station in C-2-B Districts, the Board of Zoning Adjustment ("BZA" or "Board") must first grant a special exception in accordance with the D.C. Zoning Regulations. *See* 11 D.C.M.R. § 3104.1.

5. There are approximately 44 gasoline stations within a four mile radius of the Fort Lincoln community.

The Applicant & the Applicant's Project

6. The Applicant here is CWC WDC LLC ("CWC"), which one can only assume stands for Costco Wholesale Corporation Washington. D.C. CWC's principal address is 999 Lake Drive, Issaquah, WA 98027. This is the same principal address as Costco Wholesale Corporation ("Costco Wholesale"), owner of the neighboring Costco Wholesale big box store being constructed on Lot 4 in Square 4327. Both CWC and Costco Wholesale also have the same registered agent in the District, CT Corporation System. Further, Costco Wholesale is listed as CWC's sole owner and member. Finally, as mentioned above, the Office of Planning's September 4, 2012 report lists Costco as the applicant, not CWC. Thus, for all intents and purposes, CWC and Costco Wholesale are both part of the same entity and, hereinafter, will jointly be referred to as the "Applicant" or "Costco". *See* IGSOA Preliminary Statement at 6-7, IGSOA Supp. Statement at 3-7 (for a detailed discussion explaining that Costco's Fort Lincoln location is a single establishment).

7. The proposed project involves constructing a gasoline service station with 16 pumps and 8 aisles on the Site. *See* Applicant's Prehearing Submission at 2. The station would also contain a "44 square foot controller enclosure and a pump island canopy . . . ." *Id.*

The Zoning Relief Requested – Special Exception under § 3104.1

8. Section 3104.1 permits the Board to grant special exceptions where "the special exceptions **will be in harmony with the general purpose and intent of the Zoning Regulations** and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps . . . ." 11 D.C.M.R. § 3104.1 (emphasis added). Section 101.4(d) of the D.C. Zoning Regulations state that "The provisions of any statute or other municipal regulations shall govern whenever they . . . Impose higher standards than are required by this title." 11 D.C.M.R. § 101.4(d).

9. Section 25-323(d) imposes such a higher standard, prohibiting a business from selling both gasoline and alcohol. *See* D.C. Code § 25-311(d) ("No [ABC] license shall be issued for an outlet, property, establishment, or business which sells motor vehicle gasoline . . . .").

10. Section 3104.1 of the Zoning Regulations also requires an applicant requesting a special exception to construct a gasoline station in a C-2 District to satisfy the conditions specified under §§ 702, 726, and 743.1. Section 706.4 requires an applicant to establish that "The operation of the use shall not create dangerous or other objectionable traffic conditions." 11 D.C.M.R. § 706.4.

11. Costco, through CWC, relied on a traffic study performed by Wells and Associates on June 11, 2010 ("Wells Traffic Study") to satisfy § 706.4's requirements.

12. The Wells Traffic Study contained the following flaws:

    a. The Trip Generation Handbook ("ITE Handbook") explains that there are four different categories of "trips" to gasoline stations: internal capture, pass-by trips, new trips, and diverted trips. However, the Wells Traffic Study only uses three of these trip categories, ignoring diverted trips and lumping them with pass-by trips. Excluding this fourth category is a significant error in the Wells Traffic Study and results in a new site traffic estimate that is almost 800% more than Costco's own estimates (*i.e.*, 20-26 trips versus 153-157 trips during AM and PM peak hours).

    b. The Wells Traffic Study fails to highlight the severity of the queuing problem that will exist in the southbound left turn lane on South Dakota Avenue at 33rd Place. Even the District's Department of Transportation has raised concerns about this issue.

    c. The Wells Traffic Study also fails to include an analysis of Saturday traffic. Data shows that retail and gas traffic tend to be higher on Saturdays. In fact, ITE trip generation data shows that for land uses, including gasoline stations with 16 pumps, Saturday peak hour vehicle trips (322 trips) are 44% higher than peak vehicle trips on weekdays (222 trips).

d. It is inappropriate to compare the Fort Lincoln Costco with the Costco in Sterling, Virginia. The Sterling Costco has several other "big box" stores in the nearby area. For this reason, it is only logical that the Costco at Fort Lincoln will attract more traffic than the Sterling location, considering it will be the only Costco and the only membership "big box" store in the District. Further, the Fort Lincoln Costco is located in a densely populated area, as opposed to the Sterling Costco that is located in a suburban community.

e. The Wells Traffic Study assumes a high amount of internal retail-to-retail trips (*i.e.*, 40% of trips are assumed to be internal trips). This directly contradicts with the Leesburg Costco survey results (Attachment J) where internal trips are only 10% of all trips. This implies that the Wells Traffic Study significantly underestimates the number of future trips to the site.

f. The Wells Traffic Study incorrectly states that there is a single stop sign at the intersection of Fort Lincoln Drive and 33rd Place. In reality, there are stop signs at all approaches.

g. Finally, the Wells Traffic Study's traffic assignment for gasoline station trips did not assign any trips to South Dakota Avenue turning right on to 33rd Place in the Synchro model analysis. However, the study also states that 60% and 40% of the traffic will be using this same route in the AM and PM peak hours, respectively.

CONCLUSIONS OF LAW

Preliminary Issues

IGSOA's Requests Regarding ANC 5A's Letter and/or Report in Support of Costco's Application for a Special Zoning Exception.

On October 5, 2012, the law firm of Manatt, Phelps, & Phillips, on behalf of their client, the IGSOA, filed a letter with the Board requesting that it refuse to accept a report from the ANC 5A regarding Costco's application and require the ANC 5A to properly obtain input from the community. In the alternative, the IGSOA requested that the Board decline to extend the "great weight" typically afforded to the ANC when reaching its final determination in the matter. 11 D.C.M.R. § 3115.2. The IGSOA made the following arguments in support of its request:

- Any report from the ANC 5A would now be untimely. Section 3115.1 of the D.C. Zoning Regulations states that the written report of the ANC "**shall** be submitted to the Board at least seven (7) days **in advance** of the hearing . . . ." 11 D.C.M.R. § 3115.1

(emphasis added). In fact, even ANC 5A's own bylaws state that "within 30 days of receiving notification from the District Government of proposed actions . . . the Commission **shall** forward its written recommendations with respect to the proposed actions to the . . . appropriate agency." ANC 5A Bylaws, Article V, Section 7 (emphasis added). Here, the ANC 5A failed to submit any report whatsoever.

- Commissioner Robert King has a conflict of interest in this matter, which he failed to disclose to the ANC or the community. DAG SPE Managing Member, Inc. ("DAG SPE") is the holding company for approximately 22 of the 34 gasoline stations in the District operated by members of the IGSOA, who were granted party status in this matter at the September 11th hearing. Commissioner King is involved in legal dispute with DAG SPE that dates back to March 30, 2011. This lawsuit, and Commissioner King's failure to disclose his ongoing legal dispute and lawsuit with DAG SPE, seriously calls into question his impartiality in advocating on behalf of Costco in this matter.

- Costco's legal counsel in this matter, Holland & Knight, assisted in counting votes taken at the September 10, 2012 meeting in regards to Costco's proposed gasoline station. This act was a clear conflict of interest and casts doubt on the results of the vote.

- The ANC 5A failed to provide proper notice to the community that a vote on Costco's special exception request for a gasoline station would occur at its September 26 meeting. Pursuant to § 3115.1(c), any report from the ANC 5A on this matter would now have to disclose that proper notice was not provided to the community, seriously undermining any weight this report could have with the Board.

- While Commissioner King did allow for some discussion at the September 10 single district meeting, the ANC 5A failed to allow the community any substantive discussion on Costco's request for special exception, violating Article V, Section 9 of the ANC 5A Bylaws during its September 26 meeting. The Bylaws state that "[r]esident views **will be incorporated** in positions taken by the Commission." ANC 5A Bylaws, Article V, Section 9 (emphasis added). However, during the September 26 ANC 5A meeting, there was no substantive discussion on the matter and residents who attempted to express their views were continuously ruled out of order. In fact, Commissioner Alston of ANC 5A03 also noted that the vote was premature as it had not yet been put to a vote before the Committee of the whole in compliance with ANC rules and procedures.

For these reasons, the IGSOA respectfully requests that the Board not accept any report submitted by the ANC 5A and that the ANC 5A be required to hold additional community meetings in accordance with the D.C. Zoning regulations and the ANC 5A bylaws. Further, Commissioner King should be required to disclose his conflict of interest and recuse himself

from any involvement in this matter. Alternatively, if the ANC 5A is allowed to submit a report, the Board should take the ANC 5A's recommendation with a grain of salt, instead of the deference typically given to ANC reports under § 3115.2 of the D.C. Zoning Regulations.

IGSOA's Protest and Request for Revocation of Alcoholic Beverage Regulation Administration's ("ABRA") Transfer of Costco Wholesale Corporation's License No. 089498.

On September 19, 2012, the law firm of Manatt, Phelps, & Phillips, on behalf of their client, the IGSOA, filed a protest with ABRA requesting that it revoke its July 18, 2012 approval of the transfer of Costco's License No. 089498 to its Fort Lincoln location. IGSOA argued that Costco's transfer application failed to notify ABRA and the community that its operation would also include the sale of motor vehicle gasoline. Because §25-313(d) prohibits Costco from selling both alcohol and gasoline, the IGSOA argued that Costco's license to sell alcohol should be revoked.

On October 5, 2012, the law firm of Holland and Knight, on behalf of Costco, filed its response to the IGSOA's protest.

In light of this protest, and its potential effect on the legality of Costco's proposed gasoline station, the Board should hold in abeyance its determination regarding Costco's application for special exception until ABRA rules on the protest.

Special Exception

Costco's application for a special exception to construct a gasoline station, accompanied by the Wells Traffic Study, fails to meet the requisite burden for a special exception under the applicable zoning regulations. Accordingly, the Board is required to deny Costco's 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) (emphasis added). The burden is on the applicant to establish that its proposal meet these requirements. *Id.*

Section 3104.1 of the D.C. Zoning Regulations authorizes the Board to grant special exceptions **only** if, in its judgment, "the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations . . . ." 11 D.C.M.R. § 3104.1. *See also* BZA Order. No. 18330 at 11. Further, under § 3104.1, the Board is only authorized to grant special exceptions for gasoline stations in C-2 Districts if the Applicant meets the special conditions specified under §§ 706, 726, and 2302.

Here, Costco's application for special exception failed to satisfy § 3104.1. More specifically, Costco's proposed gasoline station is not in harmony with D.C. Zoning Regulation § 101.4(d), which requires the Board to defer to any statutes or regulations that impose higher standards than those required by the zoning regulations. *See* 11 D.C.M.R. § 101.4(d) ("The provisions of any statute or other municipal regulations shall govern whenever they . . . Impose higher standards than are required by this title."). Costco's application also failed to satisfy zoning regulation § 706.4, requiring an applicant to establish that a gasoline station "shall not create dangerous or other objectionable traffic conditions." 11 D.C.M.R. § 706.4. Thus, the Applicant failed to meet the burden of proof and the Board should deny its request for special exception.

The Applicant's Proposed Gasoline Station Violates § 25-311(d) of the D.C. Code and therefore fails to meet § 3104.1 and 101.4(d) of the D.C. Zoning Regulations.

The Board erred by narrowing the scope of the Hearing and its analysis to §§ 706, 726, and 2302. *See* 9/11/12 BZA Hearing Transcript ("Transcript") at 293-94. As mentioned above, the Board must also act in accordance with § 3104.1 of the D.C. Zoning Regulations, which authorizes the Board to grant special exceptions **only** if "the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations . . . ." 11 D.C.M.R. § 3104.1. Section 101.4(d) of the zoning regulations clearly states that other statutes or regulations shall govern when imposing higher standards than the zoning regulations. Accordingly, the Board is not permitted to grant Costco's request for special exception if doing so violates another statute or regulation.

Here, the Applicant hopes to sell both gasoline and alcohol at its proposed Fort Lincoln operation. *See* IGSOA Preliminary Statement at 2-7 (providing further detail regarding § 25-313(d)'s applicability to Costco's Fort Lincoln location). However, § 25-313(d) of the D.C. Code clearly prohibits businesses from selling both gasoline and alcohol. D.C. Code § 25-313(d) ("No [ABC] license shall be issued for an outlet, property, establishment, or business which sells motor vehicle gasoline . . . ."). *See also* IGSOA Preliminary Statement at 2-7.

For this reason, pursuant to §§ 3104.1 and 101.4(d), the Board is required to deny Costco's application for special exception to construct a gasoline station. Alternatively, at the very minimum, the Board must hold its decision in abeyance until ABRA can make an official determination regarding the applicability of § 25-313(d) on Costco's Fort Lincoln location.

During the Hearing, the Applicant's planning expert, Mr. Steven Sher, came to the same interpretation of § 101.4(d) stating, "[Y]ou have to satisfy whatever is the most restrictive requirement wherever you happen to go. . . . So if the ABC regulations are more restrictive than the Zoning Regulations, they will control in that instance." Transcript at 381. What Mr. Sher did not discuss, however, is that the Board is required to act in accordance with § 3104.1.

Section 3104.1 of the D.C. Zoning Regulations authorize the Board to grant special exceptions that are in harmony with the "general purpose and intent of the Zoning Regulations." Here, because the Applicant's request is in violation of § 25-313(d) of the D.C. Code, and therefore also in violation of § 101.4(d), the Board must deny Costco's application. In the alternative, the Board should hold in abeyance its determination regarding Costco's application for special exception until ABRA rules on the protest before it.

The Applicant's Traffic Study Fails to Meet the Burden Under 706.4.

Section 706.4 of the D.C. Zoning Regulations requires applicants to establish that a gasoline station "shall not create dangerous or other objectionable traffic conditions." 11 D.C.M.R. § 706.4. To meet this burden, the Applicant relies solely on the Wells Traffic Study. However, a review of the Wells Traffic Study has revealed that the study is fundamentally flawed and fails to satisfy the requirements under § 706.4.

As mentioned above, the Wells Traffic Study contains numerous flaws and fails to paint an accurate picture of the traffic patterns that will likely result from the proposed gasoline station. *See Supra* ¶ 11(a)-(g). Generally, traffic expert Mr. Joe Mehra found that the Wells Traffic Study failed to meet § 706.4's requirements because the study had "significant errors", was "fundamentally flawed", and the study's results were "meaningless." J. Mehra Report at 1. Further, Mr. Mehra found that "the traffic study does not address the safety of current conditions, nor the safety after the gasoline station would be in operation." *Id.*

During the Hearing, the Applicant's traffic expert, Ms. Jami Milanovich, attempted to refute some of Mr. Mehra's specific concerns regarding the Wells Traffic Study. However, many of the study's flaws remain. For example:

- The Wells Traffic Study estimated the number of trips that would result from the proposed gasoline station by "using trip generation data from the Costco gas facility that exists today in Sterling, Virginia." Transcript at 224. Mr. Mehra expressed concern that the Sterling Costco was not an appropriate basis of comparison for the Fort Lincoln Costco because the "Sterling Costco is located in close proximity to other Costco's in the area", while the "Fort Lincoln Costco gas station would be the only one" in the District. J. Mehra Report at 2. *See also Supra* ¶ 11(d). Similarly, Chairman Lloyd Jordan also noted that these two locations were not "similarly situated." Transcript at 239. In response, Ms. Milanovich stated that while they believed the Sterling, VA location to be similar to the proposed Fort Lincoln location, she conceded that it was a "more suburban location." *Id.* at 239. Ms. Milanovich also conceded that the Fort Lincoln Costco would be the only big box store in the District. *Id.* at 260.

- Mr. Mehra also expressed concern that the Wells Traffic Study failed to consider Saturday traffic in its analysis. J. Mehra Report at 3-4. *See also Supra* ¶ 11(c). The Applicant claims that an analysis of the weekday traffic for that particular area was sufficient. However, Ms. Milanovich also conceded that while she was "aware that ITE data suggests that weekend traffic is somewhat higher" for retail and gas locations, the Wells Traffic Study did not analyze weekend traffic. *See* Transcript at 256-58. The Wells Traffic Study's failure to consider weekend traffic suggests that the study may have seriously underestimated the traffic patterns associated with the Applicant's proposed gasoline station.

- Additionally, Mr. Mehra noted that the Wells Traffic Study contained several significant errors, including mistakenly labeling 33rd Place, at the intersection with Fort Lincoln Drive, as a free flow street. *See* Wells Traffic Study, Exhibit E at 3. *See also supra* ¶ 11(b). Mr. Mehra pointed out, and Ms. Milanovich conceded, that the report was incorrect and that the intersection actually contained an all-way stop. Transcript at 271.

- Mr. Mehra also expressed concern that the Wells Traffic Study failed to follow the ITE Handbook's generally accepted guidance and analyze the number of "diverted trips" that would be generated by the propose gasoline station. J. Mehra Report at 2-3. Mr. Mehra explained that failing to account for these "diverted trips" was a significant error and that resulted in the Wells Traffic Study greatly underestimating the number of trips that may be generated by the proposed gas station. *Id. See also supra* ¶ 11(a). However, on cross-examination, Ms. Milanovich explained in a conclusory manner that the "diverted trips" category had been combined with the "pass-by trips" category because there was a "very minor distinction between the two." Transcript at 254-55. Ms. Milanovich provided no further insight refuting Mr. Mehra's concern that had the traffic study paid closer attention to the "diverted trips" category, the number of total trips would have increased by approximately 600-800%. J. Mehra Report at 2-3.

Furthermore, in addition to Mr. Mehra's concerns, several independent parties also highlighted problems with the Wells Traffic Study. For example, the study failed to address how the proposed gasoline station may aggravate the already poor traffic patterns caused by the Fort Lincoln Funeral Home, and its frequent funeral processions. Transcript at 339, 346, 365-66. Indeed, even Mr. Robert King, ANC Commissioner and staunch supporter of the proposed gas station, conceded that there were problems with the traffic study. *See* Transcript at 281 (Mr. King stating "The traffic's going to be problem . . . .").

For these reasons, it has become clear that the Wells Traffic Study is flawed and Costco's application for special exception failed to meet the burden required by § 706.4. Accordingly, the Board is required to deny Costco's application.

CERTIFICATE OF SERVICE

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

Kyrus Freeman, Esq.
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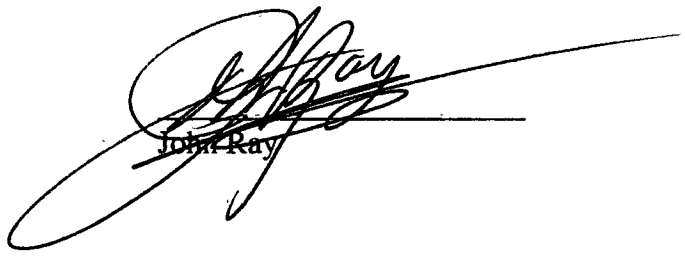
Counsel for Costco Wholesale Corporation



John Ray