Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

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Kyrus L. Freeman
kyrus.freeman@hklaw.com
202-862-5978

October 16, 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 Response to Proposed Findings of Fact and Conclusions of Law Submitted by the Independent Gas Station Operator's Alliance

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 response to the proposed Findings of Fact and Conclusions of Law submitted on October 9, 2012 by the Independent Gas Station Operator's Alliance.

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. 47

BEFORE THE DISTRICT OF COLUMBIA
BOARD ZONING ADJUSTMENT

APPLICATION OF	)	**BZA Application No. 18395**
CWC WDC LLC	)	**Hearing Date: September 11, 2012**
	)	**ANC 5A**

APPLICANT'S RESPONSE TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE INDEPENDENT GAS STATION OPERATORS ALLIANCE

Applicant CWC WDC LLC (the "Applicant"), the owner of the property located at 2431 Market Street, N.E. (Square 4327, Lot 5) (the "Site"),[1] by its undersigned counsel, hereby responds to the Independent Gas Station Operators Alliance's (the "Alliance's") proposed findings of fact and conclusions of law (the "Proposed Findings") submitted on October 9, 2012. In its Proposed Findings, the Alliance (i) emphasizes a host of irrelevant issues and factually inaccurate statements that are not part of the Board of Zoning Adjustment's (the "Board's") decision on a special exception application; (ii) attempts to improperly conflate the Applicant with Costco Warehouse Corporation ("Costco"), which is building a separate retail store on Lot 4, which is separate from the Site; (iii) mischaracterizes the Applicant's traffic study; and (iv) raises numerous arguments not supported in the record.[2] The Alliance's arguments have already been rejected by the Board as irrelevant at the public hearing on September 11, 2012 (the "Hearing") or otherwise refuted by testimony from the Applicant's qualified experts. As detailed

[1] By letter dated September 27, 2012, the 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.

[2] Apart from the Alliance's erroneous argument that the Applicant's traffic study is not reliable, the Alliance concedes that the Applicant has met all other requirements for special-exception approval under Sections 706 and 2302 of the Zoning Regulations. This is congruent with the finding of the District of Columbia Office of Planning, which stated that, based on its review, the Applicant "meets the applicable standard for approval." Ex. 29 (Office Planning Rep.).

in the Applicant's own proposed findings of fact and conclusions of law submitted on October 9 2012, the administrative record in this case decisively establishes that the requirements for a special exception have been met. Accordingly, the Board should reject the Alliance's Proposed Findings and instead adopt those proffered by the Applicant.

I. ARGUMENT

A. The Alcohol Beverage Control Issue Raised by the Alliance Is Irrelevant to this Proceeding.

In its Proposed Findings, the Alliance argues that the Board erred in refusing to consider its argument that the application should be denied based on D.C. Code § 25-313(d) because the Applicant "hopes to sell both liquor and gasoline" on the Site. (Proposed Findings 8-9.) The Board properly dismissed this argument as irrelevant at the Hearing. *See* Tr. 247:17-250:5, Sept. 11, 2012 (Chairman Jordan: "I'm finding that this line of questioning is not relevant and ask that you move on."); 293:6-8 (Chairman Jordan: "Matters [that are] before the ABC Board need to be before the ABC Board."). Not only is the Alliance's continued argument on this point factually incorrect, but it fundamentally misunderstands the scope of the Board's jurisdiction. The proper forum to raise an issue with an alcohol beverage license is with the Alcoholic Beverage Control ("ABC") Board, not the Board of Zoning of Adjustment.

The Board's jurisdiction is defined by statute and regulation. *See* D.C. Code § 6-641.07; 11 DCMR §§ 3100 *et seq*. Specifically, the Board is empowered to *inter alia* "hear and decide, in accordance with the provisions of the regulations adopted by the Zoning Commission, requests for special exceptions." D.C. Code § 6-641.07(g)(2). Pursuant to Section 726.1 of the Zoning Regulations, the Board may approve a gasoline station in a C-2 District as a special exception under Section 3104, subject to the provisions of Section 706 and Chapter 23 of the Zoning Regulations. In evaluating whether to grant such an exception, the Board looks only to the following criteria: (i) the station shall not be located within 25 feet of a Residence District unless separated from the Residence District by a street or alley, 11 DCMR §§ 706.1, 2302.2; (ii) the operation of the use shall not create dangerous or other objectionable traffic conditions, *id.* § 706.4; (iii) the Board may impose requirements pertaining to design, appearance, screening, or lighting or other requirements it deems necessary to protect adjacent or nearby property, *id.* § 706.5; (iv) all parking spaces shall be designed and operated so that sufficient access and maneuvering space is available to permit the parking and removal of any vehicle without moving any other vehicle onto public space, *id.* §§ 706.6, 2101.1; (v) the vehicular entrance or exit shall not be 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, *id.* § 2302.3; (vi) no driveway of any entrance or exit shall be closer than 40 feet to a street intersection as measured from the intersection of the curb lines extended, *id.* § 2302.4; and (vii) all grease pits or hoists constructed or established as part of the use shall be within a building, *id.* § 2302.5.

Thus, "[t]he 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). And when an applicant satisfies the requirements of the regulation, "the Board ordinarily must grant his application." *Id.* As described in the Applicant's Prehearing Statement, the Office of Planning Report, and the Wells & Associates traffic study, and the Hearing testimony, the Applicant has clearly demonstrated that it meets the special-exception standards in this case. *See* Ex. 24 (Prehearing Statement & Ex D. (Wells Report)); Ex. 29 (Office of Planning Report); Tr. 221:8-230:10;

231:5-236:10; 373:14-377:19; 380:19-382:12. Therefore, the Board should approve this application.

Furthermore, on the scope of the Board's authority, the Court of Appeals has repeatedly stated that it has been "reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created." *Spring Valley Wesley Heights Citizen Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 434, 436 (D.C. 1994) (*citing Chesapeake & Potomac Tel. Co. v. Public Service Comm'n of District of Columbia*, 378 A.2d 1085, 1089 (D.C. 1977)). In other words, the Board's authority is limited to and controlled by its statute and governing regulations. And neither of those documents permits the Board to deny a special exception application based on an alcohol beverage licensing issue. Any question as to whether an alcohol beverage license is appropriate is the exclusive domain of the ABC Board. Indeed, the Alcohol Beverage Control Act provides that "[a] license to sell alcoholic beverages in the District can only be granted by the [Alcoholic Beverage Control] Board[.]" D.C. Code § 25-104(c). Thus, as stated by the Board at the September 11, 2012 hearing, the Alliance's arguments regarding the ABC license case are not relevant to this Board's review of the special-exception standards in this case. Tr. 247:17-250:5; 293:6-8.

In response, the Alliance erroneously contends that D.C. Code § 25-313(d), part of the Alcohol Beverage Control Act, is an additional criterion that must be considered in this case. Specifically, the Alliance points to (i) 11 DMCR § 3104, which authorizes the Board to grant special exceptions that "will be in harmony with the general purpose and intent of the Zoning Regulations," and, in turn, (ii) 11 DCMR § 101.4(d), which provides that "[t]he provisions of any statute or other municipal regulations shall govern whenever they . . . (d) require higher standards than are required by [the Zoning Regulations]." The Alliance argues—just as it unsuccessfully tried to do at the Hearing—that therefore Section 101.4(d) incorporates Section 25-313(d), which is an additional standard by which the Board should judge the application. But the Alliance never points to any legal authority holding that the Board—as opposed to the ABC Board—has authority to determine compliance with Section 25-313(d).

At the Hearing, Steven Sher, who has been repeatedly qualified by the Board as an expert in the field of land use and zoning in the District of Columbia, testified that Section 101.4(d) does not grant the Board any additional jurisdiction:

> [T]here are two sections there; 101.3 and 101.4, and they do not in my opinion apply any greater standard for this Board to apply in judging a special exception application. It says where these regulations, meaning the Zoning Regulations, are more restrictive, they control whatever happens. If there is another regulation that controls something else, then it governs. In other words, you have to satisfy whatever is the most restrictive requirement wherever you happen to go. So when the District government reviews in its entirety all of the permits and all of the approval necessary for this facility, whichever gets to be more restrictive is what's going to control. So if the ABC regulations are more restrictive than the Zoning Regulations, they will control in that instance. If the environmental regulations are more restrictive, they will control. If the Zoning Regulations impose a greater setback of some sort, they will control. *But that doesn't give this Board any additional jurisdiction to apply other regulations. It's the responsibility of DDOE, ABC Board or whoever to apply their own regulations and figure out what goes on. [Y]our jurisdiction is constrained to what the Zoning Regulations require you to determine.*

Tr. 220:16-18; 380:19-382:7 (emphasis added). In other words, 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 D.C. Department of the Environment. Those regulations, just like the ones governing alcoholic beverages, will be imposed by the applicable agency and are not within the jurisdiction of the Board. Mr. Sher's testimony confirms that, when evaluating a special-exception application, such as the one here, the Board bases its decision only on the applicable Zoning Regulations—namely, Sections 706.1 and 2302. *See* Tr. 380:19-382:7.

Mr. Sher's interpretation of Section § 101.4(d) is congruent with how Board members have previously interpreted this Section. Specifically, when confronted with a similar argument on the application of Section 101.4(d), then Board vice chairman Robert Stockwell stated: "One thing I want to state is, although 101.4 does state that the provisions of any statute or other municipal regulations shall govern, *it doesn't say that this Board . . . would be the one to apply [that] standard.*" *Transcript of Public Hearing on Appeal of Fairview Heights Neighborhood Ass'n,* Case No. 16604, at 22:6-10, Sept. 13, 2000 (emphasis added). Here, Chairman Jordan likewise determined that Section 101.4(d) does not impose any additional requirements on the Board and that "matters [that are] before the ABC Board need to be before the ABC Board." Tr. 293:6-8.[3]

Chairman Jordan's decision to exclude argument or testimony on the Applicant's compliance with Section 25-313(d) finds additional support in 11 DCMR § 3117.3. Under that provision, the presiding officer at the hearing "shall have the authority to" *inter alia* (i) regulate the course of the hearing; (ii) rule upon offers of proof; and (iii) exclude irrelevant testimony. 11

[3] Specifically, Chairman Jordan and counsel for the Alliance, John Ray, engaged in the following colloquy at the Hearing:

> MR. RAY: Are you saying that 11 DCMR § 101.4(d) is not relevant here today?
>
> CHAIRMAN JORDAN: I've already [said] what's relevant for this particular hearing is dealing with Sections 706 and 2302. So that's what we're looking for testimony on today.

Tr. 293:27-294:1.

DCMR § 3117.3(a)-(l). Here, Chairman Jordan properly determined that issues related to alcohol beverage licensing were irrelevant and beyond the Board's jurisdiction and therefore appropriately limited the scope of the Alliance's case.

The Board's determination that Section 101.4(d) does not impose additional requirements on a special-exception application or otherwise expand the Board's jurisdiction would be entitled to "great deference" by the Court of Appeals. *See, e.g., Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964, 968 (2002) ("We accord great deference to any agency's interpretation of its own administrative regulations[.]"); *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 428-29 (D.C. 2006) ("Indeed, this court will grant 'particular deference' to the BZA's interpretation of its own governing statute and regulations." (citations omitted); *Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 431 A.2d 560, 565 (D.C. 1981) ("We accord great deference to an agency's interpretation of its own administrative regulations[.]"). The Court of Appeals has held that "when the BZA's decision turns on its interpretation of a regulation that agency is charged with implementing, that interpretation must be upheld unless it is plainly erroneous or inconsistent with the regulation." *Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 749 A.2d 1258, 1262 (D.C. 2000) (citations and internal quotation marks omitted).

Accordingly, because the Board has no jurisdiction to consider ABC issues, and because such issues are not among the criteria to be considered by the Board in granting or denying a special exception, the Alliance's Section 25-313(d) argument is immaterial to the Board's decision and the Board properly dismissed this argument as irrelevant in this application.

B. The Alliance Improperly Conflates the Applicant with Costco.

Even if the Board determines that it has jurisdiction to consider whether the Applicant plans to simultaneously sell gasoline and liquor in violation of D.C. Code § 25-313(d)—which it should not do for the reasons stated above—the record before the Board is devoid of any evidence that Applicant holds, or has ever even attempted to obtain, a liquor license. This is so because the Applicant has no intention of selling alcoholic beverages from the proposed gas station on Lot 5. As such, the Alliance's contention that the Applicant has violated D.C. Code § 25-313(d) is without merit.

In its Proposed Findings, the Alliance intentionally and improperly conflates the Applicant with Costco, arguing that Costco, not the Applicant, will be the "true" owner/operator of the proposed gas station. But the Board has already rejected this argument as irrelevant at the Hearing. *See* Tr. 247:17-250:5 ("I'm finding that line of questioning is not relevant and ask that you move on."). The Board's decision was proper as the Alliance's argument is fatally flawed, both legally and factually. It is well settled that a corporate entity, like the Applicant, is regarded as an entity separate and distinct from its shareholders or its parent company. *E.g.*, *Ruffin v. New Destination, LLC*, 773 F. Supp. 2d 34, 40 (D.D.C. 2011) ("Under District of Columbia law, the general rule is that a corporation is regarded as an entity separate and distinct from its shareholders, and this rule applies to limited liability companies (LLCs)."); *Heller v. Nicholas Applegate Capital Mgmt, LLC*, 498 F. Supp. 2d 100 (D.D.C. 2007) (recognizing that, even if two corporations are related, there still must be treated as having a separate and independent legal existence); *see generally* 1 Fletcher Cyc. Corp. § 43 ("As a general rule, two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly by the other."). Here, the Applicant is a distinct corporate entity, with legal rights, obligations, powers, and privileges that are different from Costco. Importantly, the Alliance failed to come forward with any credible evidence at the Hearing that would justify disregarding the Applicant's separate corporate identity and treating Costco as the "real" applicant for the special exception. (*See* Proposed Findings at 3 ¶ 6.)

Indeed, the record evidence clearly shows that the Applicant, not Costco, is the owner of Lot 5 in Square 4237, which is a distinct and separate record lot from Costco's warehouse site. *See* Tr. 231:10-232:6. Second, the Applicant, not Costco, will be the holder of the special exception, if granted. Ex. 19 (Hearing Notice). Third, the Applicant, not Costco, will be the record owner and actual operator of the proposed gas station. Tr. 370:17-371:5. Fourth, the Applicant has never obtained, or even attempted to obtain, a liquor license. *See id.* Finally, the Applicant will not permit any liquor sales on the Site. *Id.* In fact, the proposed gas station will not even have a convenience store of any kind.

Accordingly, because the Applicant and Costco are separate and distinct legal entities and the Alliance's attempt to cast Costco as the "real" special-exception applicant is without support, the Board should reject the Alliance's argument that the Application violates of D.C. Code § 25-313(d).

C. The Applicant's Traffic Report is Reliable and the Applicant Has Taken Additional Measures to Mitigate Effects on Local Traffic.

The Alliance argues that the Applicant's traffic study does not satisfy Section 706.4 of the Zoning Regulations and that the Board must therefore deny the Application. (*See* Proposed Findings, 9-10.) This argument is without merit. The traffic study is based on reliable principles and methods[4] and it establishes that the proposed gasoline service station will not adversely

[4] The DDOT report states that DDOT is "in general agreement with this overall approach to estimating the roadway impact from the Applicant's proposed development." Ex. 27 at 2.

impact local traffic.

Section 706.4 of the Zoning Regulations provides that a gasoline station "shall not create dangerous or other objectionable traffic conditions." 11 DCMR § 706.4. To establish that the proposed gasoline station will not create dangerous or objectionable traffic conditions, the Applicant commissioned a transportation impact analysis by Wells & Associates, a nationally recognized traffic engineering consulting firm. The Wells & Associates report, which was attached to the Applicant's Prehearing Submission, Ex. 24 as Exhibit D (the "Wells Report"), is entitled to deference because (i) it was prepared by a leading expert in the field,[5] and (ii) the findings in the Report were independently reviewed and endorsed by the District Department of Transportation ("DDOT") in a Memorandum to the Board dated August 31, 2012 ("DDOT Memorandum").[6] *See id*; Tr. 225:10-15; 228:5-6.

The Wells Report confirms that the operation and use of the proposed gasoline service station on the Site 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. *See* Ex. 36 (Wells & Assocs., Hrg. Presentation); Tr. 223:7-19; 377:16-19.

Additionally, the Wells Report, and the supplemental memorandum dated September 5, 2012, make 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.

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[5] The Wells Report was prepared by Jami L. Milanovich, P.E., who was qualified as an expert in the field of traffic engineering in this proceeding. *See* Tr. 220:16-18.

[6] The DDOT Memorandum is Ex. 27.

peak hour vehicular trips; (ii) traffic associated with the proposed gasoline station will have a negligible impact on the surrounding intersections; and (iii) 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. *See* Ex. 36 (Well & Assocs., Hrg. Presentation); Tr. 272:21-273:3; 228:14-230:10. Moreover, DDOT reviewed the impacts of the proposed gas station and found that most of the trips generated by the gas station were not new, but instead vehicles already on the roadway for other reasons. DDOT determined 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. " Ex. 27 at 1. Based on the foregoing, it is clear that the Application complies with the requirements of Section 706.4 of the Zoning Regulations.

1. The Wells Report Accurately Analyzes Trip Generation.

The Alliance attempts to discredit the Wells Report, by claiming that it improperly formulates the site trip generation (*i.e.*, "new trips," "internal trips," and "pass-by trips") for the proposed gasoline station. This argument is disingenuous at best and intentionally misleading at worst. First, Wells & Associates reviewed the Institute of Transportation Engineers' ("ITE") *Trip Generation Manual*, which includes trip generation rates for a number of land uses. In particular, the *Trip Generation Manual* includes several gasoline related land uses: (i) Gasoline/Service Station; (ii) Gasoline/Service Station with Convenience Market; (iii) Gasoline/Service Station with Convenience Market and Car Wash; and (iv) Convenience Market with Gas Pumps. The "Convenience market with Gas Pumps" was dismissed as a logical choice since the gas pumps are a secondary use in this category, and the proposed gas facility will not include a convenience store. Although the remaining three uses differ from the proposed gas facility because they included additional services that are not proposed in conjunction with the gas facility, the trip-generation data associated with these uses were reviewed since gasoline dispensing was the primary uses in each of the three categories. In fact, the DDOT report states that the trip generation rates used by Wells & Associates was actually higher than those found in the ITE Trip Generation Manual. Ex. 27 at 2.

Furthermore, the Alliance contends that the Wells Report is flawed because "diverted trips" were improperly included in the category of "pass-by trips." (*See* Proposed Findings at 4 ¶ 12(a).) It was proper for Wells & Associates to include "diverted trips" together with "pass-by trips" because both types of trips reflect the same situation in which a person en route to another destination stops to get gas on their way to their destination. *See* Tr. 254:5-11. The difference between diverted-link trips and pass-by trips is minor and has to do with the route that is taken to get to the gas facility. *See id.* A pass-by trip is one in which the car is already on the roadway that the gas station is on and merely turns into the driveway to get to the gas station. A diverted-link trip is one in which the driver turns off a roadway and onto another roadway to access the gas station. Wells & Associates combined the two categories of trips to simplify its analysis, while still accurately accounting for all the diverted and pass-by trips. *See* Tr. 253:20-255:7. Moreover, DDOT stated that it is "in general agreement with this conservative approach with the reduction factors and net *new* trip generation estimate proposed by the Applicant." Ex. 27 at 2.

2. Queuing capacity at the intersection of 33rd Place and South Dakota Avenue was correctly analyzed and will be mitigated.

The Alliance argues that the Wells Report does not adequately address the queuing capacity at the intersection of South Dakota Avenue and 33rd Place, and that DDOT has raised concerns about this issue. The Applicant, through its consultant, Wells & Associates, responded to DDOT by memorandum dated September 5, 2012. *See* Ex. 36 (Well & Assocs., Hrg. Presentation). To mitigate trips generated by the proposed gasoline station and the Shops at Dakota Crossing on the intersections at 33rd Place/South Dakota Avenue and 33rd Place/Fort Lincoln Drive, the Applicant has proposed that:

> Pavement markings be added to 33rd Place designating the left turn lane as a left turn only lane, the middle lane as a shared left/through lane, and the right lane as a right turn only lane. Additionally, per DDOT's request, [the Applicant] will continue to work with DDOT through the permitting processing to ensure that additional signal timing adjustments recommended in conjunction with [the Applicant's] gasoline pumps are incorporated into the time changes made in conjunction with the improvements DDOT is implementing for the retail center.

See id. (*citing* Applicant's memorandum to DDOT at 3, dated Sept. 5, 2012). This makes clear that the Applicant is committed to working with DDOT and other stakeholders throughout this process and beyond to ensure that any trips generated by the proposed gasoline service station are appropriately mitigated in coordination with planned traffic mitigation measures for the Shops at Dakota Crossing. Tr. 229:4-22.

3. The Members-Only Gas Stations Were Reliable Comparison Sites.

The Alliance erroneously contends that the members-only gas facility in Sterling, Virginia is not an appropriate basis of comparison because the location is not similarly situated to the proposed gas facility. (*See* Proposed Findings at 9.) The gas facilities analyzed in the Wells Report, including the gas facility in Sterling, Virginia, are reliable comparison sites because they are multi-pump gas facilities similar in terms of size and surrounding uses as that of the proposed gas facility. Tr. 223:7-225:9. At the outset of its study, Wells & Associates undertook a thorough analysis to determine the most appropriate method for ascertaining the anticipated trip generation for the proposed gasoline facility since it is a unique use. Ex. 36 (Well & Assocs., Hrg. Presentation); Tr. 228:4-16. Members-only gas facilities differ from conventional gasoline service stations because they do not include any supplemental services such as vehicle service stations, convenience markets, or car washes. Tr. 223: 7-14.

Accordingly, given the proposed gas facility is a unique use, members-only facility, Wells & Associates evaluated trip generation data for several members-only gas facilities already in operation. Tr. 223:15-225:15. These sites included: (i) Sterling, Virginia; (ii) Leesburg, Virginia; and (iii) Barrie, Ontario. The data available for these sites included not only baseline trip generation rates but also information regarding the number of trips that are internal trips (*i.e.*, trips that were made to another store in the shopping center that also stopped at the gas facility) and pass-by trips (*i.e.*, trips that were en route to another destination and stopped at the gas facility in passing). *See id.*

Furthermore, the Alliance argues that the Sterling gas facility is not a proper comparison facility because it is in a suburban area and has several other members-only discount gas facilities in the nearby area, while the proposed gas facility will be the only members-only discount gas facility in the District. This argument fails, however, because the distances between the two nearest members-only discount gas facilities and the Applicant's proposed gas facility is *less* than the distances between the two nearest members-only discount gas facilities and the Sterling gas facility. In fact, the closet two members-only discount gas facilities to the Sterling gas facility are (1) the Leesburg Costco, approximately 11 miles away and (2) the Fairfax B.J's Wholesale Store, approximately 15 miles away. The closest two members-only discount gas facilities to the proposed gas station are (1) the Lanham, MD Costco, approximately 7.9 miles away and (2) the Beltsville, MD Costco, approximately 9 miles away. *See* Tr. 259:18-260:13.[7]

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[7] The transcript includes a typographical error in Ms. Milanovich's testimony. The Transcript erroneously states that Ms. Milanovich testified, "The nearest Costco with a gas station is *92 miles* from the proposed Fort Lincoln site."

The Sterling gas facility is not an improper comparable, as the Alliance suggests; rather, it was selected precisely because its high traffic volumes are most similar to those expected at the Site based on analysis of the Site done by Wells & Associates. In fact, the use of the Sterling gas facility as a comparable for the proposed gasoline service station was endorsed by DDOT in its Memorandum to the Board:

> In order to forecast the net new trips from the gas station on to District roadways, the Applicant utilized trip generation rates based on another Costco gas station in the greater Washington DC area that had average daily traffic on adjacent roadways that were comparable to the Site. *Using case studies for unique land uses, such as club member-only gas stations, is a preferred method over employing the industry standard Institute of Transportation Engineers (ITE) Trip Generation Manual.*

Ex. 27; Tr. 225:10-15. Additionally, DDOT points out that Wells & Associates was conservative in its approach, noting that "the Applicant did not take any trip reduction credit for the fact that the gas station is replacing a proposed undesignated pad site whose trip generation would have been part of the larger Shops at South Dakota Crossing." *Id.*

4. Analysis of weekday morning and afternoon peak periods was proper.

Next, the Alliance argues that the Wells Report fails to include an analysis of Saturday traffic. The Wells report, however, properly focuses on the weekday traffic during the morning and evening peak periods because these are the highest traffic volume times in vicinity of proposed gas station. The traffic volumes on Saturday in the study area are significantly lower than the weekday traffic. *See* Tr. 256: 5-13. Wells & Associates discussed the scope of the analysis with DDOT prior to commencing the study, and DDOT agreed that the traffic impacts

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Tr. 260: 9-10. However, Ms. Milanovich actually testified that the nearest members-only discount gas station is "9 and one half miles away." *See* BZA Video of the Hearing at 4:51:56.

would be adequately evaluated by examining the morning and evening weekday peak hours. *See* Tr. 256:1-258:21.

5. The intersection of Fort Lincoln Drive and 33rd Place was properly analyzed.

The Alliance claims that the Wells Report incorrectly analyzes the intersection of Fort Lincoln Drive and 33rd Place as having a single stop sign rather than stop signs on all approaches. (*See* Proposed Findings at 5, 10.) The Wells Report, however, correctly analyzed the intersection under both existing and future conditions. First, the Highway Capacity Manual ("HCM") methodology, which is the industry standard methodology, limits the analysis of all-way stop controlled intersections to two-lane approaches. Since the northbound approach at the intersection of Fort Lincoln Drive and 33rd Place has three lanes, the HCM Methodology does not provide levels of service for the intersection when modeled as an all-way stop controlled intersection. *See* Tr. 271:3-18. Therefore, modeling the intersection with a stop sign on Fort Lincoln Drive, rather than on all approaches, provided a reasonable approximation of the levels of service at this intersection under existing conditions.

Moreover, under future conditions, the intersection will be signalized in conjunction with the Shops at Dakota Crossing. Ex. 36 (Well & Assocs., Hrg. Presentation); Tr. 271:14-18. Therefore, the intersection was modeled as a signalized intersection under background conditions, without the proposed gas facility, and future conditions, with the proposed gas facility. *See id.* A comparison of these two scenarios allowed Wells & Associates to correctly identify and analyze the impact of the proposed gas facility on the intersection. *See* Tr. 271:3-18.

D. Several of the Arguments in the Alliance's Proposed Findings Were Premature and Lack Any Basis in the Record as of the Filing Date.

In its Proposed Findings, the Alliance included proposed facts, styled as "preliminary issues," that were needlessly premature and not supported by the administrative record as of the date of the filing. Specifically, the Alliance has included proposed facts relating to (i) the alleged untimeliness of the Advisory Neighborhood Commission's ("ANC's") letter; (ii) an alleged conflict of interest between an ANC commissioner and non-party to this proceeding; (iii) alleged irregularities with the voting process at a single-member district meeting; and (iv) alleged deficiencies with the ANC meeting notice and process. (Proposed Findings at 6.) None of these allegations have any support in the record before the Board, and should therefore be rejected by the Board. *See generally Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C. 1994) (explaining that BZA decision must be supported by substantial evidence in the record). Notwithstanding that, the Applicant will address these allegations as part of its forthcoming response to the ANC's letter, which was filed with the Board on October 12, 2012.

II. CONCLUSION

For all the foregoing reasons, the Board should reject the Alliance's Proposed Findings and instead adopt those proffered by the Applicant.

Dated: October 16, 2012

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: ______________________
Norman M. Glasgow, Jr.
Kyrus L. Freeman
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 955-3000
(202) 955-5564
norman.glasgowjr@hklaw.com
kyrus.freeman@hklaw.com

Counsel for Applicant CWC WDC LLC

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of October, 2012, I served a true and correct copy of the foregoing by email and hand delivery on the following:

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

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Kyrus L. Freeman