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October 16, 2012

BY E-MAIL AND HAND DELIVERY

District of Columbia Board of Zoning Adjustment
441 4th Street N.W.
Washington, D.C. 20001

Re: Response to Applicant's Proposed Findings of Fact and Conclusions of Law (Case No. 18395)

Honorable Members of the Board:

On behalf of the Independent Gas Station Operators Alliance ("IGSOA"), please find enclosed the IGSOA's response to the Applicant's proposed Findings of Fact and Conclusions of Law submitted on October 9, 2012 for the above referenced matter. Please feel free to contact me with any questions or concerns.

Sincerely,

John Ray
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Enclosure

cc: ANC 5A, Chairperson Janae Grant
Kyrus L. Freeman, Holland & Knight

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18395
EXHIBIT NO. 48

Board of Zoning Adjustment
District of Columbia
CASE NO.18395
EXHIBIT NO.48

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BY E-MAIL AND HAND DELIVERY

To:	Chairperson Lloyd Jordan and Members of the Board D.C. Board of Zoning Adjustment
From:	John Ray Jennifer Sincavage Howard Yuan Counsel to the Independent Gas Station Operators Alliance
Date:	October 16, 2012
Subject:	Response to CWC WDC LLC's Proposed Order in BZA Case No. 18395

The Independent Gas Station Operators Alliance ("IGSOA" or "Alliance") hereby submits its response to CWC WDC LLC's ("Costco") Proposed Findings of Fact and Conclusions of Law ("Proposed Order") in BZA Case No. 18395. We argue that the D.C. Board of Zoning Adjustment ("BZA") should disregard portions of the Proposed Order based on the following:

- The Board should refuse to accept or to afford "great weight," pursuant to D.C. Code § 1-309.10(d)(A), to ANC 5A's letter recommending approval of the proposed gas service station ("ANC Letter") because: 1) the ANC Letter is untimely, 2) the issue was voted upon by ANC 5A without proper notice, sufficient participation from the community, or adherence to ANC procedure and protocol and 3) ANC 5A's endorsement is tainted with impropriety.

- The Board's authority to grant special exceptions is governed by Sections 3104.1 and 101.4(d) of the D.C. Zoning Regulations.

- The Board should find that Costco's application for special exception, along with the Wells & Associates traffic study ("Wells Traffic Study"), failed to satisfy Section 706.4 of the D.C. Zoning Regulations because: 1) the Proposed Order incorrectly assumes that members-only gasoline stations will produce less trips than other gasoline stations; 2) the Wells Traffic Study did not properly formulate the site trip generation; 3) the study's comparison of the Sterling, VA Costco with the proposed Fort Lincoln Costco was inappropriate; and 4) the Wells Traffic Study itself was fundamentally flawed.

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The Board should refuse to accept or to afford "great weight" to the ANC Letter.

In its Proposed Order, Costco states that the Board is required to assign "great weight" to the affected ANC's recommendation. Proposed Order at 15-16. However, because there are still a number of unresolved issues related to the ANC 5A's recommendation, which will be discussed in greater detail in IGSOA's October 19 response to the ANC 5A's recommendation, the IGSOA respectfully requests that the Board decline to extend the "great weight" typically afforded to the ANC. More specifically, as discussed by the IGSOA in its own proposed order, the Board should refuse to afford "great weight" to the ANC letter because:

- 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.

The Board's authority to grant special exceptions is governed by Sections 3104.1 and 101.4(d) of the D.C. Zoning Regulations.

Costco's Proposed Order states that while §101.4(d) of the D.C. Zoning Regulations require that an application for special exception to "satisfy the most restrictive requirements necessary for all of the permits and approvals needed in order to operate the proposed gas service station", the regulations of other District agencies are not "within the jurisdiction of the Board." Proposed Order at 12. Costco, and the Board at its September 11 hearing, are incorrect.

As mentioned in IGSOA's proposed order, the Board must 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. Further, "in considering applications for special exceptions the Board must exercise its discretion consistently with **the directives and guidelines found in the regulations.**" *Citizens Ass'n of Georgetown v. Dist. of Columbia Bd. of Zoning Adjustment*, 365 A.2d 372, 374 (D.C. 1976) (emphasis added). Accordingly, the Board is not permitted to grant Costco's request for special exception if doing so violates another statute or regulation.

Here, Costco hopes to sell both gasoline and alcohol at its proposed Fort Lincoln operation. *See* BZA Exhibit 25, IGSOA Prelim. 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* BZA Exhibit 25, IGSOA Prelim. Statement at 2-7.

For these reasons, the IGSOA respectfully requests that the Board consider §§ 3104.1 and 101.4(d) when reaching its final determination on Costco's application for special exception.

The Board should find that Costco's application for special exception, along with the Wells Traffic Study, failed to satisfy Section 706.4 of the D.C. Zoning Regulations.

Section 3104.1 of the D.C. Zoning Regulations only authorizes the Board to grant special exceptions for gasoline stations if the Applicant meets the special conditions specified under §§ 706, 726, 2303. 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. Here, Costco's Proposed Order incorrectly states that Costco's application for special exception, along with the Wells Traffic Study, satisfied this requirement under § 706.4 and should therefore be disregarded.

First, Costco mistakenly states that members-only gasoline stations "minimize the number of trips typically associated with a gasoline service use." Proposed Order at 5, ¶ 17. Indeed, Costco's own traffic expert stated that the trip generation rates from the Sterling Costco members-only gasoline station that Wells & Associates relied on were "**higher** than the than the trip generation rates for the three gasoline- related land uses in the ITE trip generation manual." 9/11/12 Hearing Transcript at 264 (emphasis added). *See also* BZA Exhibit 31, IGSOA Supp. Statement, Exh. 6 at 4 (Traffic expert Joe Mehra reaching the same conclusion).

Second, Costco's Proposed Order states that "the Wells Report properly formulates the site trip generation (*i.e.*, "new trips, [sic] "internal trips" and "pass-by trips") for the proposed gas service station." Proposed Order at 10. Again, Costco is mistaken. The ITE Trip Generation Handbook explains that there are four different categories of "trips" to gasoline stations, the three categories referenced above by Costco and a fourth category, "diverted trips". The Wells Traffic Study's failure to account for "diverted trips" as a stand-alone category was a fundamental error. Including this fourth category of trips could potentially have increased the total number of trips by approximately 600-800%. BZA Exhibit 31, IGSOA Supp. Statement, Exh. 6 at 2-3.

Third, the Proposed Order states that the Wells Traffic Study used similar gas facilities in Sterling, Virginia; Leesburg, Virginia; and Barrie, Ontario to evaluate trip generation data for the Fort Lincoln location. Proposed Order at 10. Costco stated that these three locations "were relevant in that they are multi-pump gas facilities similar in terms of size and surrounding uses as that of the proposed Applicant." *Id.* However, the Wells Traffic Study's comparison of these locations to the Fort Lincoln location was flawed. Unlike these three locations, the Fort Lincoln Costco will be located in a highly densely populated area frequented with heavy interstate, intercity, and commuter traffic. Furthermore, the Fort Lincoln Costco will be the only national membership big box store in the District.

Finally, Costco states, "The Board accepts the findings made in the Wells & Associates traffic study . . . that the operation and use of the proposed gasoline service station on the Site will not create dangerous or other objectionable traffic conditions." Proposed Order at 5. This statement, in addition to any other statements relying on the propriety of the Wells Traffic Study, should be excluded from the Board's final order. For the reasons above, and the numerous other reasons listed in the IGSOA's own proposed order, the Wells Traffic Study was fundamentally flawed, and as a result, Costco's application for special exception failed to meet the requirements under § 706.4 of the D.C. Zoning Regulations. *See* IGSOA Proposed Order at 4-5, 9-10.

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 16th day of October, 2012 on the following:

Kyrus Freeman, Esq.
Holland & Knight
800 17th Street NW, Suite 1100
Washington, DC 20006

Counsel for Costco Wholesale Corporation

John Ray