

RECEIVED
D.C. OFFICE OF ZONING
2012 OCT 19 PM 3:12

BY E-MAIL AND HAND DELIVERY

To: Chairperson Lloyd Jordan and Members
D.C. Board of Zoning Adjustment

From: John Ray
Jennifer Sincavage

Date: October 19, 2012 File No.: 46601.030

Subject: IGSOA's Response to ANC 5A's October 5, 2012 Letter to the BZA in
Support of CWC WDC LLC Special Exception Request No. 18395

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18395
EXHIBIT NO. 50

The Independent Gas Station Operators Alliance ("IGSOA" or "Alliance") hereby submits its response to ANC 5A's October 5, 2012 letter ("ANC 5A Letter") to the Board of Zoning Adjustment ("BZA" or "Board") recommending approval of CWC WDC LLC's ("Costco") application for a special zoning exception to construct a gasoline station at its Market Street location in Fort Lincoln. The Alliance respectfully requests that the Board refuse to accept or afford "great weight," pursuant to D.C. Code § 1-309.10(d)(A), to the ANC 5A Letter based on the following:

- The ANC 5A Letter is untimely.
- The motion passed in support of Costco's exception request was voted upon by ANC 5A without proper notice to or sufficient participation from the community, and without adherence to ANC procedure and protocol.
- The endorsement from ANC 5A is largely due to efforts made by 5A12 SMD Commissioner Robert King, whose actions throughout the process have been unethical and improper.

I. The ANC 5A Letter is untimely

Title 11 D.C.M.R. § 3115.1 of the D.C. Zoning Regulations states, in relevant part, that the written report of the ANC *shall* be submitted to the Board *at least seven (7) days in advance* of the [Board] hearing, and that the ANC shall designate a representative to present the report. ANC 5A was provided with notice of Costco's special exception request on April 20, 2012. BZA Exhibits 15, 16. That notice also provided an approximate hearing date of September 2012.

Chairperson Lloyd Jordan and Members
D.C. Board of Zoning Adjustment
October 19, 2012
Page 2

Id. Despite the fact that ANC 5A knew as early as April 20 that the Board would hold a hearing on Costco's special exception request in September, it did not take a vote on the proposed gasoline station at its regular meetings in May, June or July. It was not until ANC 5A held its regular meeting on July 25, 2012 that the ANC voted to request a second traffic study related to the gasoline station.

Despite the fact that ANC 5A knew as of July 25 that it would not be able to take a vote on the proposed gasoline station before the September 11 hearing (given that it would be in recess during the month of August), ANC 5A failed to request a waiver of the 7-day requirement from the Board or postponement of the hearing date.¹ The only waiver sought was from ANC 5A12 Commissioner Robert King with regard to testimony relating to his Single Member District ("SMD"). ANC 5A Letter, Enclosure 3.²

Although Chairperson Jordan left the record open at the conclusion of the September 11 hearing, he also stated on the record that the Board was not making a determination as to whether it would accept a report from the ANC, and that it would instead decide that issue if and when ANC 5A filed a report. September 11, 2012 BZA Hearing Transcript ("Transcript"), p. 283. To accept the ANC 5A Letter at this late stage would subject the Alliance, the party in opposition to Costco's request, at a distinct disadvantage. The Alliance would have no opportunity to cross-examine ANC 5A with respect to its statement in support of Costco's special exception request, or to cross-examine Commissioner King with regard to new evidence that has come to light demonstrating his conflict of interest in supporting Costco's position and various other improprieties.

II. The motion passed in support of Costco's exception request was voted upon by ANC 5A without proper notice to or sufficient participation from the community, and without adherence to ANC procedure and protocol.

Additionally, the motion in support of Costco's exception request, which was voted upon by ANC 5A at its September 26 regular meeting, was done so without adherence to ANC procedure and protocol.

¹ There is nothing to indicate that the hearing date could not be delayed with respect to this matter. In fact, the Board itself could have decided *sua sponte* to delay the hearing in order to receive a timely recommendation from ANC 5A.

² There is nothing in the record to suggest that ANC 5A elected Commissioner King to serve as its representative at the September 11 hearing. On the contrary, the transcript of the BZA hearing, reveals that Commissioner King was only present in his capacity as commissioner of his SMD. Transcript, p. 274-275.

Chairperson Lloyd Jordan and Members
D.C. Board of Zoning Adjustment
October 19, 2012
Page 3

A. The motion was voted upon without proper notice to the community in advance of the September 26 meeting.

At the September 11 BZA hearing, Commissioner King testified twice that ANC 5A would vote on whether to support Costco's special exception request at its September 26 meeting. Transcript, pp. 274, 280. Yet, the agenda for the September 26 meeting contained no mention that such a vote would be taken. Attachment 1. The ANC 5A Letter submitted to the Board says proper notice of the September 26 meeting was provided to the community, however, the only notice that Costco's proposed gasoline station would be discussed at the meeting appears to have come from flyers the Alliance mailed out to community residents. It is insufficient for ANC 5A to rely on third parties to satisfy its notice requirement under 11 D.C.M.R. § 3115.1(c).

B. The motion was voted upon at the September 26 meeting without allowing full participation from the community.

Article V, Section 9 of the ANC 5A Bylaws states that "[r]esident views will be incorporated in positions taken by the Commission." ANC 5A Bylaws, publicly available at <http://www.anc5a.org/library.html>. The ANC 5A Letter states that ANC 5A considered Costco's application at its September 26, 2012 regular meeting where it heard from Ward 5 Councilmember Kenyan McDuffie and Michael A. Brown, Chairman of the Council's Committee on Economic Development and Housing, with regard to their positions on the issue. Those comments were made by Councilmember McDuffie as part of his general presentation to the Board and the community, and not with respect to a discussion on Costco's special exception request. While some community members were allowed to respond to the Councilman's comments about Costco's proposal, there certainly was not a full and frank discussion with full participation from the community.

The ANC 5A Letter also states that Costco attended numerous meetings regarding its gas station proposal, "including meetings on June 9, June 16, a single member district meeting on June 23, and an emergency single member district meeting on September 10." ANC 5A Letter, p. 1. In fact, all four of the meetings referenced by Commissioner Grant were SMD meetings held by Commissioner King for SMD 5A12. ANC 5A Letter, Enclosure 3 (Copies of Meeting Flyers and Meeting Agendas). There is no evidence that Costco's proposed gasoline station was ever discussed fully at a regular ANC 5A meeting.³

³ ANC 5A has not posted minutes from its regular meetings since April 25, 2012. The minutes of the April 25 meeting do not reflect any discussion with regard to Costco's proposed gasoline station.

Chairperson Lloyd Jordan and Members
D.C. Board of Zoning Adjustment
October 19, 2012
Page 4

Finally, the ANC 5A Letter states that “at our ANC meeting on September 26, the community asked many questions regarding the gas station before we voted with our Councilmember present.” *Id.* at 3. This is factually incorrect. Councilmember McDuffie left before the vote was taken with regard to Costco’s proposed gasoline station. In fact, he apologized to community members for leaving early, explaining that he had to put his two daughters, who were in attendance with him, to bed for the night. The vote itself was held in the final minutes of the ANC meeting shortly before 9:00 p.m.—the time at which the meeting had to conclude. As a result, the vote was hurried and further discussion by the community was not allowed until after the vote had been taken.⁴

III. The endorsement from ANC 5A is largely due to efforts made by 5A12 SMD Commissioner Robert King, whose actions throughout the process have been unethical and improper.

Most troubling to the Alliance is ANC 5A12 Commissioner King’s conduct as a proponent of Costco’s special exception request and the author of the motion passed by ANC 5A on September 26.⁵ According to community members, the SMD meetings Commissioner King conducted with regard to the Costco gasoline station proposal were unfair and lacking in transparency. Transcript, pp. 368-369. Additionally, as brought to light at the September 26 ANC 5A meeting, Commissioner King had a clear conflict of interest which he failed to disclose.

A. Improper Vote Counting by Costco

At the ANC 5A meeting on September 26, Claude Matthews, a resident of Commissioner King’s SMD, objected to the fact that a Holland & Knight attorney representing Costco in its matter before the Board assisted in counting the votes taken at the September 10 ANC 5A12 meeting in support of Costco’s proposed gas station. According to ANC 5A07 Commissioner Carolyn Steptoe, who was also in attendance at that meeting, the votes were informally tallied, and the final number reached was 30-50 votes shy of the number of people Commissioner Steptoe counted in attendance at the meeting when she first arrived.

⁴ Additionally, ANC 5A03 Commissioner Angel Alston noted during the meeting and on the record that the vote on the Costco gasoline station was not in adherence with ANC procedure and protocol as the issue had not first been presented to the “committee of the whole.”

⁵ Incidentally, not even Commissioner King, one of Costco’s most ardent supporters in its matter before the Board, can distinguish between Costco and “CWC WDC LLC”—the purported owner and operator of the proposed gasoline station. The motion voted upon by ANC 5A on September 26 makes repeated reference to the applicant as “Costco warehouse.” ANC 5A Letter, Enclosure 1 (Motion Approved by SMD 5A12, dated September 10, 2012).

Chairperson Lloyd Jordan and Members
D.C. Board of Zoning Adjustment
October 19, 2012
Page 5

B. Commissioner King's Conflict of Interest

Commissioner King has been the driving force behind ANC 5A's support of Costco's proposal. Immediately preceding the vote on September 26, however, Commissioner Steptoe demanded an explanation from Commissioner King with respect to documents she found on the ANC 5A computer that she claimed called into question his impartiality in the matter. Commissioner Steptoe also noted that she had referred those documents to the D.C. Office of the Attorney General for further investigation. Attachment 2.

The documents Commissioner Steptoe was referring to relate to a lawsuit filed on August 9, 2012 by Commissioner King against DAG SPE Managing Member, Inc. ("DAG"). Attachment 3. DAG is the holding company for approximately 22 of the 34 gasoline stations in the District operated by members of the Alliance in the impacted area. According to the President of DAG, the dispute between Commissioner King dates back to March 30, 2011. Attachment 4.

According to an October 16, 2012 article that appeared in the *Brookland Heartbeat*, the dispute arose after Commissioner King demanded \$5 million from DAG to settle what he described as DAG's unauthorized use of his name on corporate documents. According to the article, "Mr. King said DAG asked him what it would take to settle the matter without a lawsuit and he said '\$5 million.' He said DAG offered him \$30,000, which he rejected. 'Nobody has a right to use my name without my permission,' said Mr. King." Attachment 5.

At the ANC 5A September 26 meeting, a community member voiced concerns that Commissioner King had initially opposed Costco's gasoline station request and was now in support of the proposal. Yet, when questioned about his change of position on the record at the September 11 hearing, Commissioner King denied ever having supported a gasoline station. Transcript, pp. 284-287. Commissioner King's change of heart regarding Costco's proposal was more than a coincidence. It came on the heels of his inability to secure \$5 million from DAG's owner and, as described in the *Brookland Heartbeat* article, someone he once considered a trusted friend. There is little doubt that a Costco gasoline station in Fort Lincoln will have a negative economic impact on DAG and its independent, gasoline service station operators (the majority of whom are also members of the Alliance). At the very least, Commissioner King owed the members of his SMD, ANC 5A and the Board full disclosure of his potential conflict of interest in advocating on behalf of Costco—allowing the community, the ANC and the Board to determine whether the conflict was sufficient to warrant Commissioner King's recusal from the matter. Commissioner King's conduct places a cloud over the integrity of the entire process.

Chairperson Lloyd Jordan and Members
D.C. Board of Zoning Adjustment
October 19, 2012
Page 6

C. Community Amenities and Benefits

Commissioner King provided transportation to Fort Lincoln seniors to attend the September 10, 2012 SMD meeting he called to vote on Costco's gasoline station proposal. ANC 5A Letter, Enclosure 3. The agendas for this meeting, and SMD meetings Commissioner King held on June 9, June 23, and July 10, all reference an "amenities and benefits package" and/or the "Fort Lincoln Senior Citizens Wish List." *Id.* Although 11 D.C.M.R. § Section 2403.6 allows for benefits that enhance "the surrounding neighborhood or the public in *general*," the Alliance, on information and belief, has reason to believe that many senior citizens in the Fort Lincoln community may have been promised *individual* benefits (*e.g.*, computers, flat-screen tvs, and exercise equipment). Although there is no evidence of a specific *quid pro quo* (*i.e.*, that the individual benefits were promised in exchange for votes in support of the Costco gasoline station proposal), they provide one more example of the types of issues the Alliance would like to cross-examine ANC 5A—and, more specifically, Commissioner King about—but, will not have the opportunity to do given the untimeliness of ANC 5A's appearance in this matter.

Conclusion

This case demonstrates why it is so important to have the ANC present at Board hearings, and to submit its report in accordance with 11 D.C.M.R. § 3115.1 of the D.C. Zoning Regulations. Without sufficient explanation, ANC 5A has submitted its letter in support of Costco's proposed gasoline station nearly a month after the hearing date. Should the Board accept ANC 5A's letter, and afford it "great weight," it will do so without allowing the Alliance the opportunity to cross-examine ANC 5A on all of the issues presented herein. As such, we respectfully call upon the Board to refuse to accept the ANC 5A Letter at this late date due to the defects in the ANC 5A Letter itself, the defects in the process leading up to the vote on September 26 and the serious questions surrounding Commissioner King and his impartiality and behavior in effecting the September 26 vote.