

“Federation Corner” column  
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## **Winning like Charlie Sheen**

By Donna R. Savage

In a huge holiday present to Kensington and Wheaton residents, the County’s Hearing Examiner, Martin Grossman, issued his final report on December 12, recommending to the Board of Appeals that Costco’s Special Exception application for a mega gas station at Westfield Wheaton be denied.

This recommendation follows similar prior recommendations from the County’s Planning Board and the County’s Planning staff in early 2013. The Kensington Heights Civic Association (KHCA), along with the Stop Costco Gas Coalition and several other civic and environmental supporters, has fought this proposal for 5 years since its announcement.

In late 2010, Costco officially announced its intention to open a store in Westfield Wheaton but stated that its decision to move forward was conditioned on getting approval to build a gas station – without going through the zoning Special Exception process required of all gas stations in the County. When Costco demanded the County Council authorize this special treatment, KHCA and numerous others testified in opposition. That advocacy prevailed and the Council refused to allow Costco to skip the standard gas station approval process. Win #1! (Costco agreed to build the store anyway.)

Kensington Heights residents and others then lobbied the Council to pass County-wide legislation requiring a minimum buffer area for large gas stations (those pumping at least 3.6 million gallons per year; or less than one-third of the 12 million gallons Costco projected for its gas station). We had argued that the buffer should be at least 1,000 feet from homes, schools, and outdoor recreation areas; what actually passed was a requirement that these oversized gas stations be sited at least 300 feet from schools and outdoor recreation areas, but not from homes. Win #2 (sort of)!

The 1,000 foot limit would have barred the Costco gas station from being placed in the Wheaton mall; the 300 foot limit (without homes) allowed it to be moved a few dozen feet so it would be 347 feet from the Kenmont Swim & Tennis Club (but only 118 feet to the nearest homes). In response to Costco’s revised application, the County’s professional Planning Staff recommended denial because of potential health concerns – to nearby residents, the 400 Kenmont Club families, and the severely disabled children attending the nearby Stephen Knolls School. Win #3!

Next, a public hearing was held by the County’s Planning Board on February 28, 2013. The Board’s majority voted to recommend denial because the proposed gas station would be incompatible with the Wheaton Sector Plan, a long-term planning document that focused on Wheaton’s future as a smart growth, transit-oriented hub. The proposed Costco gas station did not fit that vision because it would be a huge, auto-centric business expected to draw vehicles from all over the region to a location less than one-third of a mile from the Wheaton Metrorail platform. Win #4!

The next step turned out to be the longest Special Exception hearing in the County’s history, lasting 37 days, from April 2013 until September 2014. The result was 9,500 pages of testimony and approximately 650 exhibits, with the testimony of many expert witnesses (mostly for Costco) and

“learned laypersons” (for the Opposition). The 262-page opinion and 230 pages of appendices can be read by clicking on case S-2863 at [http://www.montgomerycountymd.gov/OZAH/spec\\_excep.html](http://www.montgomerycountymd.gov/OZAH/spec_excep.html). The Hearing Examiner’s recommendation for denial constitutes Win #5!

The Hearing Examiner concluded that the “Petitioner has not met its burden of proving, by a preponderance of the evidence, that the automobile filling station use it proposes would meet all of the specific and general requirements for the special exception. While Petitioner made many of the required showings, it has not made all of the required showings, and therefore the Petition should be denied.” (page 261, emphasis in original) Of special note were issues related to adverse health effects and incompatibility with the neighborhood. The Hearing Examiner confined his conclusions to “this particular proposal, at this particular location, at the level of usage planned (12,000,000 gallons of gas sales a year), with the proposed design, and the proximity of residences, a community swimming pool, and the Stephen Knolls School which serves many medically fragile children.” (page 166)

Lessons learned to date. The Board of Appeals (BoA) must still make the final decision as to whether this Special Exception application should be approved, a decision that is expected sometime in early 2015. The Opposition is cautiously optimistic but there are many lessons learned to date. First, of course, is the vast quantity of (volunteer) time and money (for legal and other expenses) required to fight these battles. Costco, the third largest retailer in the world, likely outspent the Opposition by 10-to-1 or more.

That dollar imbalance directly relates to the role of expert testimony. Many points raised by the Opposition were backed by years of community activism and knowledge of the neighborhoods, but testimony by Costco’s “experts” generally was treated as dispositive – except when they were shown to have created egregious errors or when the Opposition could rely on findings by government agencies. Opposition groups are way out of their financial league when fighting zoning exceptions; although the Petitioner bears the burden of proof, that doesn’t mean much if citizens cannot afford to expose the errors in the testimony.

Next steps. The BoA hearing is ordinarily not public; however, if an aggrieved party requests oral argument and the request is granted, the BoA hearing becomes public. About 1 month after its hearing, the BoA will write its report, which is based on the reports from the Hearing Examiner, the Planning Board, and the Planning staff. Either side can appeal the BoA’s decision to the state courts.

Bottom line. Costco has had three strikes on its gas station application. We hope the BoA will agree that this application has struck out! KHCA deeply thanks everyone who worked and contributed to this result.