IN THE

Court of Special Appeals of Maryland

SEPTEMBER TERM, 2015

No. 02450

COSTCO WHOLESALE CORPORATION.,

Appellant,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,

Appellees.

CERTIFICATE OF SERVICE

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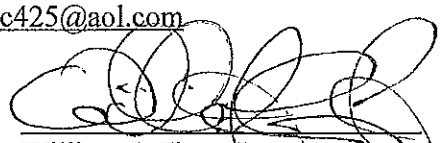

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APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY
(Gary E. Bair, Judge)

BRIEF OF APPELLEE KENSINGTON HEIGHTS CIVIC ASSOCIATION

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STATEMENT OF THE CASE

Kensington Heights Civic Association ("KHCA") adopts the Statement of the Case presented by Appellee Montgomery County.

QUESTIONS PRESENTED

1. Did Costco meet its burden to prove that, upon consideration of all relevant evidence, that there would be no "adverse [effects on] health, safety, and general welfare" from emissions associated with operation of its proposed station.

2. Did Costco meet its burden to prove that traffic, pedestrian safety, and parking congestion issues would not adversely affect the portion of the "neighborhood" within the Mall and the ability of residents in the surrounding areas to access and utilize the Mall within the meaning of the stated provisions in the Zoning Code?

3. Is Costco's preemption argument barred because it was untimely raised?

4. Assuming the argument was timely raised, does State law preempt the ability of the Board of Appeals ("Board") to conduct an independent, holistic assessment of the public health effects of the proposed station at the proposed location?

STATEMENT OF FACTS

While KHCA does note a few inaccuracies in Sections 1 and 2 of Costco's Statement of Facts, none are significant here. Section 3 is adopted, except for the conclusory sentence that the "station will not cause air in the vicinity of the station to exceed NAAQS for either NO_2 or $PM_{2.5}$." With respect to subsections 3.a and b, KHCA agrees that the statements made there reflect Mr. Sullivan's testimony; KHCA does not agree that the testimony is valid or that the statements represent the Hearing Examiner and Board's findings based on the totality of the evidence and their assessment of the witnesses' credibility. With respect to Section 4, KHCA does not agree that the truncated version of the evidence fairly presents the relevant issues and sets out its own statement.

1. Overview

This case involves Costco Wholesale Corporation's ("Costco") efforts to obtain approval from Montgomery County for a special exception to build a gas station at the Westfield Wheaton Mall adjacent to its warehouse facility. The station created unique issues of suitability under the then-applicable Zoning Code provisions (2004) at 59-G-1.21(a) and 59-G-2.06.[1/] In particular, it was expected to:

- pump 12 million gallons per year, 6-8 times a typical station, and triple the volume of the other largest county stations (E1673, E1968-E1970);
- routinely have long lines of idling cars whenever the warehouse was open (11 cars on average during weekdays and 25 on weekends; peaking as high as 46-48 cars, a factor not present at other stations) (E76; E1894, E2462; E2351-52);
- create emissions from those idling cars known to create adverse health effects, particularly for those with respiratory illnesses (E138-E143);
- be located deep within a very busy mall, requiring users to travel further within the mall, increasing congestion and emissions (E19; E851);
- increase traffic at Mall intersections that could push them to a failing level (E175-76; E2064-E2070, Ex. 376 - thumb drive with videos for Ex. 375);
- create more interactions between cars and pedestrians in a very crowded parking lot, raising the potential for accidents in contravention of County efforts to reduce such accidents (E184-E185; E2071-E2076);
- be located directly across a main driving aisle from the Costco warehouse loading dock creating conflicts between trucks and station customers (E17-E18, E38, E2053-E2063, E2077-E2085); all while

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[1/] The County recently updated its Zoning Ordinance, effective October 30, 2014; Special Exception applications pending on that date were grandfathered and are reviewed under the prior provisions. Section 59.7.1.1.B.1 of Zoning Ordinance (2014). (**E4**, fn. 3).

- being only one-third of a mile from a Metrorail and Metrobus transit hub, in an area that already has more than two dozen gas stations within a 7-minute driving radius and no shortage of supply (E49-52; E230, E233).

In addition to the factors specific to the station itself, it was also originally proposed to be built in very close proximity to the Kenmont Swim & Tennis Club ("Kenmont") and nearby homes and about 1300 feet from the Stephen Knolls School – a school for the County's most severely physically and mentally challenged children. (E18 (grassy area shows original station location), E19, E605-E606, E1736).

Costco pressed the County to enact a Zoning Text Amendment (ZTA 10-04) that would exempt it from the normal Special Exception process for the station with the threat that it would not build its proposed warehouse absent the exemption. When that was unsuccessful, it backed down and agreed to file a Special Exception request (S-2794) and build the warehouse regardless of the outcome of that request. (E4, fn. 2, E848). While that application was pending, a second Zoning Text Amendment (ZTA 12-07) was filed in April 2012 to deal in a prophylactic way with the new wave of "large" gas stations (*i.e.*, those selling more than 3.6 million gallons per year) that the Costco proposal foreshadowed. As introduced, ZTA 12-07 proposed a 1,000-foot buffer zone from schools, outdoor recreational uses, and other sensitive uses. (E1965). In August 2012, the ZTA was amended and enacted to require that a "large" station must be built "at least 300 feet" from the specified uses; it did not bar a larger buffer if the station exceeded 3.6 million gallons. (E68-E72, E1671, E1971).

Under the ZTA, Costco could no longer build where – until then – it had stated was the *only* viable and acceptable spot for its station. (E551-E552, E606, E852-E853, E855, E947-E949; E1148, E1274-E1275, E1736). Nevertheless, it refiled a new Special Exception request (S-2863) on November 13, 2012, which moved the station 260 feet eastward so it was now 375 feet from the Kenmont property line (E4, E25). The new location, though, was now only 875 feet from Stephen Knolls and 118 feet from the nearest home. (E19). An additional 14 homes approved to be built directly south of the station would be even closer. (E111). In addition the station would now be placed in a location that engendered many more conflicts with shoppers, visitors, and delivery trucks. (E18; E2449, E2540-E2541).

The Technical Staff for the Planning Board issued its report on S-2863 on February 20 and 27, 2013, recommending *denial*, based on the staff's conclusion that Costco could not prove that the station: a) would not constitute a nuisance due to fumes emanating therefrom, and b) would not adversely affect the health of local residents, visitors, or workers. (E5-E6, E1414, E1435, E1439-E1448). Costco responded, denying those conclusions. (Ex. 73). On February 28, 2013, the Planning Board held a lengthy public hearing and also voted to recommend *denial*. While, in light of Costco's dispute of the Staff's position on the health issues, only two of the five Planning Board members adopted that ground for dismissal,[2/] three members found the station was incompatible

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[2/] The Hearing Examiners's report noted that the Planning Board had evaluated the (continued...)

with the County's emphasis on transit-oriented development nearby. (E6, E10, E1449-E1451).

Thereafter, proceedings before the Hearing Examiner commenced on April 26, 2013, and lasted for 37 days. (E7, fn. 6). During the hearings, significant problems were shown by the Opposition (KHCA and the Stop Costco Gas Coalition) in reports of all three of Costco's main experts: Wes Guckert for traffic (E182, fn. 79; *see also* E2596-E2599), David Sullivan for air quality (E13, fn. 15), and Dr. Kenneth Chase for health issues. The Hearing Examiner stated (E13-14) that:

> [T]he most important "cuts" against Petitioner's case were self-inflicted wounds, especially *the egregious mathematical error by Petitioner's air quality expert*, David Sullivan, resulting in a striking underestimation of one-hour NO_2 concentrations in his initial reports, and *the erroneous focus of Petitioner's sole health expert, Dr. Kenneth Chase, on studies of the impacts of automotive diesel emissions, in a case involving a gas station which does not sell diesel fuel.* Mr. Sullivan's error forced him to repeatedly relax the initial conservatism in his evaluation in favor of estimates he characterized as more accurate. Dr. Chase's initial mis-focus resulted in his testimony being more anecdotal than scientific on a crucial health issue in the case. [Emphases added.]

In the end, the Hearing Examiner concluded that a combination of factors made *this* proposal inappropriate at *this* location, while disavowing any ruling that *all* large filling stations were problematic. (E205):

[2/](...continued)
health effects without knowing that Costco's expert report on nitrogen dioxide emissions had made an "egregious" mathematical error – converting background readings by *dividing* when he should have *multiplied*, thereby reducing those levels by a factor of almost 4, a fact not learned until much later. (E86).

> [T]he compatibility issues arise in this case not because the proposal here is for a gas station, but because it is for this particular type of gas station (a very large one with lines of idling cars) located in this particular neighborhood (i.e., 118 feet from single family residences, 375 feet from a neighborhood pool [the Kenmont Swim and Tennis Club ("Kenmont")] and 874 feet from a school [Stephen Knolls] with severely disabled children). It is these particulars which render the proposal incompatible, not the mere fact that it calls for a gas station in a mall parking lot.

That combination of factors, including as well, the existence of pedestrians and outside dining patrons breathing the air near the station and the other sources of emissions in the area that already created elevated pollution levels resulted, the Hearing Examiner found, in a "perfect storm" of pollution" (E165). Costco, he stated, had failed to prove that it met several specific Special Exception requirements (E247-E248, E250):

> [T]he proposed use would have the non-inherent characteristics identified by Technical Staff, and those non-inherent effects alone, and in combination with the inherent characteristics of the use, will have significant adverse effects on the general neighborhood. The non-inherent characteristics of the proposed auto filling station and the resulting adverse effects make the proposed use incompatible with the adjacent residential neighborhood . . . . The . . . auto filling station will not be in harmony with the adjacent residential neighborhood . . . due to the adverse effects of traffic congestion, parking congestion and additional physical activity... as well as the potential health impacts.

He also found that the buffer zone set by ZTA 12-07 had to be applied sensitively to the precise facts here and warranted a further separation beyond the minimum 300 feet required there. (E72).[3/] While he differed from the Planning Board as to "consistency

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[3/] A subsequent Zoning Text Amendment (ZTA 15-07) was passed by the County Council on December 1, 2015, that included homes, and expanded the buffer area to 500 feet. This ZTA, though, (which would effectively bar the station from being placed in the (continued...)

with the Sector Plan, the Planning Board's conclusions in this regard are tantamount to a negative evaluation of compatibility with present and planned development in the neighborhood" and thus were consistent with his own views. (E205).

> [I]t appears that the Council, while setting a minimum setback for specified uses, relied on the special exception process and standards to enable the Hearing Examiner and the Board of Appeals to make the health evaluation for other uses based on the circumstances of individual cases.

On March 11, 2015, the Board of Appeals voted to adopt the Hearing Examiner's report, including his findings the station violated Sec. 59-G-1.21(a) and 59-G-2.06 of the Zoning Ordinance (fumes as a nuisance); Section 59-G-1.21(a)(4) (lack of harmony with neighborhood due to traffic and parking congestion, additional physical activity and potential health effects); Section 59-G-1.21(a)(5) (harm to quiet enjoyment); Section 59-G-1.21(a)(6) (physical activity and objectionable fumes); and Section 59-G-1.21(a)(8) (failure to prove use will not adversely affect health, safety, and general welfare). (E250-E251, E253-E254). The written decision issued April 3, 2015. (E492-E495).

Costco filed its Petition for Review on April 30, 2015. In that Petition, Costco's primary argument differed from that advanced before the Hearing Examiner. As set out in detail in the Coalition's Brief, Costco had argued during the hearing that, in deciding the public health effects issue under Section 59-G-1.21(a)(4) and (8), the Hearing Examiner *should* adopt its view that the maximum levels used in the EPA's National

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[3/](...continued)
Mall location) is subject to the grandfathering noted above in the new Zoning Code.

Ambient Air Quality Standards ("NAAQS") were the only relevant measuring tools. Dr. Chase also testified that compliance with those levels was sufficient to show that there could be no adverse health effects. The Hearing Examiner explained in his report why he rejected those arguments and applied a broader, more nuanced view of how to use the current NAAQS and other evidence presented by the Opposition in his independent assessment of the health issue. That report was adopted *in toto* by the Board of Appeals (E494).

In its Circuit Court Petition, though, Costco argued that the Hearing Examiner and the Board had *no* discretion to consider any of that health-based evidence because, it asserted, Maryland had specifically adopted and applied the NAAQS to gas stations such that a zoning board has no discretion to look at any factors beyond compliance with those standards. As such, Costco argued, Maryland law preempts any right of the County to make its own assessment of health effects of a proposed station in the zoning process. (Pet. 16-24). Based on this new approach, Costco dropped any reliance on its own health expert's testimony, because that testimony too would be irrelevant under its newly-discovered preemption argument.[4/]

[4/] During the hearing, Costco submitted two expert reports from Dr. Chase and he testified for more than a full day as the Hearing Examiner discussed in detail. (E128-E135). In its Circuit Court brief, though, Costco only referred to him in a single footnote (p. 8, fn. 3) and he has disappeared entirely in the current brief.

However, this preemption argument, as the Circuit Court found "pellucid" in its December 18, 2015 opinion (E509) was not raised either explicitly or implicitly during the proceedings below, and, as such, was not appropriately considered then. Even assuming the argument was not untimely, the Circuit Court also found (E509-E510) that it was without merit, finding that the State regulation was not so broad as to preempt the fundamental right of the County to:

> look at the specific proposed use at a particular site and determine whether there would be any adverse effects. The NAAQS standards were not adopted for this purpose, nor were they adopted with a specific neighborhood (or use) in mind). Therefore, compliance with the NAAQS is not equivalent to an affirmative establishment that no adverse health effects would arise from a proposed use.

Costco also argued (Pet. 24-27) that, even if the health issues were not preempted by State law, that the Board's decision was arbitrary and capricious, on the merits, because of the failure to adopt and apply a global emissions standard. The Circuit Court rejected that argument (E511), finding that established standards might not provide an adequate basis to assess a unique situation such as that presented by the "most sensitive" population of children at Stephen Knolls. The Circuit Court also noted that the County Zoning Ordinance provides that even compliance with all specific Special Exception standards does not create a presumption of compatibility or force the Board to approve the request. (E511-E512). Finally, the Circuit Court found there was substantial evidence in the hearing record to support the Board's findings that there were traffic and safety issues

separate from the vehicular emissions that also justified the finding of incompatibility. (E512-E513). Costco's appeal from that adverse decision was filed on January 15, 2016.

The discussion below will focus on the two areas – health impacts and traffic safety – that the Hearing Examiner and the Board relied on to deny approval. It will highlight, first, the actual language of the EPA rules and the emissions standards established thereunder. Second, it will discuss Costco's ever-changing efforts to show compliance with those standards - an effort that the Hearing Examiner eventually found unavailing, despite Costco's presentation of its contentions in its Statement of Fact as if they had been accepted. The analysis will then briefly describe the traffic and safety issues that the Hearing Examiner and Board relied on to find the proposed station to be incompatible at the proposed location.

2. Emissions And Health Issues

The Hearing's Examiner's analysis primarily focused on two aspects of vehicle tailpipe emissions – nitrogen dioxide ("NO_2") and fine particulate matter ("PM2.5") – both of which create adverse health effects that would support denial under the Special Exception requirements. KHCA adopts the Memorandum of the Coalition with respect to the nature of the health effects and the studies analyzing pollution levels that have resulted in observable effects in the real world. There is no dispute that those two pollutants cause illnesses that severely affect the daily lives of individuals suffering therefrom. The discussion here, accordingly, will focus on the Hearing Examiner's

findings as to whether Costco has adequately proven: a) the pollution levels that will likely exist around this station and b) that those levels are insufficient to create adverse health effects at this location.

Costco's Brief argues that: a) the EPA has established NAAQS which impose a single relevant number to be met in order to limit emissions to protect health and the environment; b) Costco has proven that it correctly modeled the NAAQS emissions created around the station; and c) if its modeled number is below the NAAQS, the Hearing Examiner should have found no adverse health effects could occur therefrom. As discussed below, the Hearing Examiner found, to the contrary, on all three counts.

a. Reading and Applying the EPA's Rules Setting NAAQS

The NAAQS for NO_2 and $PM_{2.5}$ are set out in two EPA Rules (Exhibit 424(b) ("NO_2 Rule"), E2229 *et seq.*, and Exhibit 424(f) ("$PM_{2.5}$ Rule"), E2253 *et seq.*).[5/] Each Rule sets separate limits for short- and long-term air quality levels; for this case, the salient levels are the short-term (1-hour) limit for NO_2 (set in 2010) of 100 ppb or 188 $\mu g/m^3$ (E2231), and the long-term (annual limit) for $PM_{2.5}$ of 12 $\mu g/m^3$, which had been revised in January 2013 from the prior limit of 15 $\mu g/m^3$. (E2254).

In the NO_2 Rule, the EPA explained that NO_2 emissions show a gradient as one

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[5/] Exhibit 404(e), E2154, summarizes the Rules. While the actual Rules obviously control, the exhibit highlights the salient portions in a more readable form and is useful used in conjunction with the discussion below.

moves away from the applicable source.[6/] Thus, if a source is a busy road with a peak level of 100 ppb, the level in surrounding neighborhoods a few hundred yards away could be as little as 50% of that level. Peak levels are particularly critical to a 1-hour standard because a person could well be in or near that peak exposure area for that time period. Lower level exposures for longer time periods (such as would occur away from the peak point) can also be harmful. As a result, the EPA discussed the need to set a standard that would limit exposures in both the short-term peak location and the overall area. The two alternatives considered were: a) to set an absolute *peak* standard in the range of 80 to 100 ppb so that the gradient would ensure that area-wide exposures would be well below the peak, or b) to set a much lower *area-wide* NO_2 concentration of, say, 50 ppb with the assumption that the gradient would then limit peak levels to 100 ppb or less. Setting the absolute peak emissions level at 100 ppb, the EPA stated "*would be expected to limit peak 'area-wide' concentrations to approximately 75 ppb or below.*" (E65, E2240) (Emphasis added by Hearing Examiner.)

The EPA eventually chose the "peak exposure" concept and set the NAAQS at 100 ppb (188 $\mu g/m^3$). It did so relying primarily on five studies that had found adverse health effects at area-wide exposure levels of 85-94 ppb and another study (on which it placed less reliance) that found effects at levels as low as 50 ppb. (E2245). Those studies, it

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[6/] The summary of the NO_2 Rule is taken from the Hearing Examiner's report (E62-E64) which discusses that Rule and the testimony of KHCA's expert, Dr. Patrick Breysse and Ms. Cordry (E979-E989). *See also* E2163-E2166.

stated, provided "strong support" for limiting area-wide exposures to 85 ppb or less; further, if the gradients were correct, setting a peak level of 100 would be expected to ensure that those area-wide exposures would actually be between *50 to 75 ppb*. *Id.* The Hearing Examiner accordingly agreed that the 100 ppb peak exposure point limit set in the NAAQS was not intended – *by the Rule's own language* – to indicate that 100 ppb was a safe limit for area-wide exposures, particularly if the localized neighborhood had very vulnerable populations. (E67).

The EPA also explained, in both the NO_2 Rule and the $PM_{2.5}$ Rule (E2230-E2231, E2246; E2257) that, while it must set NAAQS at levels intended to provide a margin of safety for sensitive populations, the levels could not be set at a point that would entail *no* risk or that would protect the "most sensitive individuals." Unlike a zoning approval that relates to only a single facility, the NAAQS are used nationwide to govern state emission levels and major projects, so the EPA must take a middle course – setting a standard that is neither too lenient nor too strict. As a result, as noted in the $PM_{2.5}$ Rule, the EPA sets the standard not at the most protective level indicated by any of the cited studies but rather at the level in studies in which it "ha[d] the most confidence." (E2264, E2266).

EPA's caution is particularly relevant here because the gas station would be only 875 feet from the Stephen Knolls School, a special facility for the County's children with special needs who are *hypersensitive* to these pollutants. The Hearing Examiner held that the EPA's basis for setting a NAAQS could not be expected to deal with the localized

effects arising from a mega gas station with idling cars sited close by a school for severely disabled children. Rather, he found, such issues are reasonably left by the federal and state governments to the nuanced analysis available in a Special Exception application. (E66-E67, E164-E165). The Board accepted that recommendation and its conclusion was upheld by the Circuit Court. (E510).

b. Emission Levels in the Mall Area

During the hearing, Costco tried to prove that it met the substantive public health criteria in the Special Exception standards through Mr. Sullivan's testimony as to the amount of likely emissions and Dr. Kenneth Chase's testimony as to whether those projected levels would be unsafe if they met, or perhaps even exceeded, the NAAQS. Presumably because the Hearing Examiner found Dr. Chase's testimony largely without merit (E130-E135, E162-E163), Costco has now dropped *any* separate analysis of the health issues or reference to Dr. Chase. Instead, it now claims (Brief, p. 10), that its "evidence of health impact consisted primarily of comparisons of projected air quality to the NAAQS, since those standards are required to be protective of health of even sensitive populations." Thus, Costco now rests its entire case on its claim that if its projected emissions from the gas station will not violate the NAAQS, this conclusively proves there would be no adverse health effects. As shown above, its argument is already flawed because its fails to acknowledge that the peak level was set in the NO_2 Rule based on evidence that *observed* health effects occurred at area-wide exposures well below the

peak. But even if the NO_2 Rule were as Costco wishes it were, Costco would still have to prove that it could reliably show that its emissions would not exceed the NAAQS – proof that, in the end, the Hearing Examiner found Costco failed to supply.

The discussion below discusses the multiplicity of reports Costco filed for two reasons: first, because Costco's Brief is written as if the Hearing Examiner had accepted – rather than rejected – its ever-changing evidence, and second, because the Brief cherry picks values from different reports prepared over an 18-month period, using vastly different assumptions, and covering different areas. Because of those differences, it is quite literally impossible to compare apples to apples within Mr. Sullivan's ever-changing orchard. Costco's Statement of Facts suggests that there is nothing unusual about the way that Mr. Sullivan's reports constantly changed, but the Hearing Examiner indicated that, in assessing the value to be accorded to that testimony, he could not ignore that Mr. Sullivan had initially been just as confident about his initial, invalid results as he was about his later modeling. Nor could he overlook that the changes had been made on each occasion to achieve the desired result after the Opposition had successfully challenged the validity of the prior calculations. The effect of such changes was to reduce the credibility of all of the reports and the Hearing Examiner so found. (E14-E15).

i. The First Round of Sullivan Reports

Mr. Sullivan submitted a detailed study of the proposed station area in November 2012 (with updates in December 2012 and January 2013) (E1374, E1393, and E1400,

respectively) that used background monitor readings from stations located around the Washington metropolitan area. He then made assumptions about the station operations and local conditions in order to model the additions to be made to the background levels. Those assumptions were set out in a "protocol" that was discussed with the Opposition, but decided unilaterally by Mr. Sullivan (E81; Ex. 615(a)). They included:

- a "rural" dispersion model "based on EPA guidance;" an "urban" model (which resulted in lower emission levels) cited for "perspective" only, and a statement that the "most accurate characterization" was "between the urban and rural results" (E1380);

- use of an older "Mobile 6.2" model, rather than the newer "MOVES" model to generate emissions from each vehicle (E92, E1385); and

- background monitors showing the "maximum concentration . . . measured in the area over the past three years" (i.e., 2009-2011) (E1375, E1401-1402). The $PM_{2.5}$ annual reading was taken from the one monitor at Beltsville that was read daily and gave the highest values (E2290-E2293).

The initial reports analyzed an area that included the major roads surrounding the Mall (E1382) (where peak concentrations could be expected) and plotted the results as concentric circles ("isopleths") showing different emissions levels. The highest isopleth shown in November for 1-hour NO_2 (E1388) was 175 $\mu g/m^3$ (i.e., just below the peak 188 $\mu g/m^3$ NAAQS limit) on both the roads and the proposed station location. No actual "peak" reading number was included and, indeed, the December report showed a tighter isopleth with a *190* reading on the roads, which *would* exceed the NAAQS. Not surprisingly, that isopleth quickly disappeared in the January report. (*Compare* E1397 with E1409). Mr. Sullivan apparently assumed that he only need show that the readings

at the homes, school, and pool (which he calculated as between 81 to 94 μg/m3) would fall below the 188 μg/m3 limit – failing to recognize that those are "area-wide" readings, rather than the peak readings on the roads and at the station that the NAAQS actually limits. (E1406).

With respect to $PM_{2.5}$, the initial reports showed modeled isopleths around the station of 12.35-12.45 $\mu g/m^3$ (based on a background level of 12.1) – levels that would violate the 12 $\mu g/m^3$ level that was put in place in January 2013 by the $PM_{2.5}$ Rule. (E1389, E1398, E1412). Mr. Sullivan stated in his January report that a "more typical (less conservative) background" would be 10.6 $\mu g/m^3$, and that revised value would allow his modeled numbers to meet the NAAQS. (E1412). He reached that lower background value, though, by unilaterally revising the Protocol's statement as to the monitor that would be used – an approach that became a continuing motif in his reports.[7/] (E2287-E2288, E2294-E2297).

Mr. Sullivan was confident that his original analysis was "way overkill" to show the station was safe – right up until the moment, during cross-examination, he was forced to admit that he had made an error in converting background readings from the unit of measurement ("parts per billion") that was used on the monitors to the "micrograms/meter

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[7/] There were lengthy debates about the many changes Mr. Sullivan made to his choice of background levels. (*See* detailed analysis in Ex. 431(c), E2298 *et seq.*) While the Hearing Examiner allowed him to submit the changes, they were, as noted above, part of the reason for the Hearing Examiner's general skepticism of his findings.

cubed" units that he used in his analysis. By dividing, rather than multiplying the monitor reading by 1.88, he had arrived at a background value of only *28* $\mu g/m^3$ rather than the correct value of *98* $\mu g/m^3$. (E85-E86, E770, E774-E778). If the 175 $\mu g/m^3$ isopleths shown in the January report were increased by the added 70 units of the correct background emissions, that would bring them to 245 $\mu g/m^3$, well over the 188 NAAQS limit. Similarly, the levels at Stephen Knolls and Kenmont would now be 152 and 161 $\mu g/m^3$ (81 and 86 ppb), placing them in the general range of exposures where the EPA had already found health effects to occur (E112-E113, E1881, E1884). KHCA then sought summary judgment (E1854, E1856, E1912); the Hearing Examiner denied the motion but instructed Mr. Sullivan that "the final date for [submission of] any final plans, data, anything else" was August 9 and "no further changes will be accepted . . . absent a darn good [showing of good cause]" (transcript corrected). (E793, E1955, E1980).

ii. The Second Sullivan Report and Opposition Testimony

In that new August report, Mr. Sullivan first showed his original modeling with the new background number and conceded that the "peak" reading, under the original Protocol, would be *388 µg/m3* at the station area, more than double the NAAQS of 188 µg/m3. That analysis also showed levels of 200-300 µg/m3 on the roads, which again would substantially exceed the NAAQs. That was clearly unacceptable so Mr. Sullivan revised several assumptions about background level selections, local conditions, and the dispersion model to make them less stringent. (E113-E115; E796-E799, E1874, E1890).

Even with all of those revisions, the new report *still* showed a "peak" value at the gas station source of 217 $\mu g/m^3$ under the rural dispersion model and 168 $\mu g/m^3$ for the urban model (E114; E1897). The average, which Mr. Sullivan had stated would be the "most accurate characterization," was 192.5, again above the NAAQS.

Notably, this analysis did not consider the effect of those emissions on customers and workers breathing the air in the directly adjacent warehouse or the nearby outdoor restaurant seating, although Mr. Sullivan conceded the levels would likely be about the same for NO_2 whether inside or outside. (E825, E845). Moreover, the area shown in the new report is constricted to the immediate station and excludes nearby roads so it is not possible to tell if peak readings there would exceed the NAAQS. (E1897). The report also no longer gives specific values for homes, the school, or the pool, nor does it state what portion of emissions are related to the station itself so the two reports cannot be directly compared. The pictures at E1897, though do appear to show that nearby homes, would be at 140 $\mu g/m^3$ (74 ppb) or higher under the rural model, and 110 $\mu g/m^3$ (59 ppb) or above for the urban model – both still within the range the NO_2 Rule showed were of concern to the EPA.

Mr. Sullivan testified that this analysis was *still* conservative because he could have made other changes. In particular, he noted, rather than using a single *maximum* background level for all hours, he could have "paired" the actual (lower) background level for any given hour with the modeling for that hour. (E805). Second, he could have

relied on the fact that not all tailpipe emissions begin as NO_2. Rather, most begin as nitrogen oxide ("NO") and are converted to the harmful NO_2 by interacting with available ozone in the air, so there may not be 100% conversion. (This is called the Ozone Limiting Method or "OLM"). (E87-E88; E805-E806). Mr. Sullivan had also noted these same points in his November 2012 report (E1385, E1390-E1392) but again did not rely on them in this report.

When the Opposition's expert, Dr. Henry Cole, testified in December 2013 he questioned both the assumptions and the analysis used in Mr. Sullivan's reports and noted many of the inherent uncertainties in modeling that were not reflected in those reports. He also noted that EPA guidance for the OLM would not allow Mr. Sullivan to simply assert that only a small portion of NO was converted to NO_2; rather, he would have to do a detailed analysis and receive EPA permission to use any ratio below 80%. (E81-E85, E89-E93, E100-E01; E880, E883-E85, E897, E905-E07, E1992-E93). Dr. Breysse made similar points with respect to whether Mr. Sullivan's approach adequately dealt with the uncertainty issues in his modeling. (E144-E145; E1019-E1022, E1076-E1079). The Opposition also testified about the correct reading of the NO_2 Rule (as discussed above) and presented studies showing adverse health effects at exposures below the NAAQS, again suggesting the levels in Mr. Sullivan's second report were still problematic.

iii. The Third Sullivan Report

Apparently recognizing those concerns, Costco had Mr. Sullivan submit *another*

report in February 2014 during its rebuttal case, despite the Hearing Examiner's August 2013 deadline for introducing any new analysis. (E2363 *et seq.*). This new report now included the changes (paired backgrounds and use of the OLM) that Mr. Sullivan had consciously excluded before and revised other assumptions to again make them less conservative. (E87-E88, E94, E99-E100; E2370-E2372, E2403). Mr. Sullivan said he carried out the OLM analysis because Dr. Cole had "requested" it be done and that the OLM "was developed for stack sources – primarily power plant stacks" so using it "for a relatively large, ground-based area source is not a standard application," but he had devised a way to apply OLM to this scenario. (E1159, E2368-E2370, E2389).

The Opposition objected that the report violated the August 2013 deadline; that Dr. Cole's testimony had merely noted flaws in Sullivan's report, not suggested that he make untimely changes thereto; that Dr. Cole had never discussed the "paired background" issue; and, finally, that the report was not proper rebuttal because Costco had closed its case in chief without presenting evidence that it already had. (E2418, E2427, E2452). The Hearing Examiner denied the motions and allowed the new report to be submitted. (E11, E2464).[8/] KHCA also requested that portions of the report dealing with the OLM be stricken because his approach did not meet the *Frye* "general scientific acceptance"

[8/] The Opposition also argued, *inter alia*, that it would be unfair to allow a new report to reduce background levels over time if the Opposition were "frozen in time" as to health studies occurring after the most recent NAAQS. (E1091, E2453) The Hearing Examiner denied the Opposition's effort to exclude the February report as untimely, noting that he would look at updated data from both parties. (E2467).

test. (E2468). The Hearing Examiner denied that motion as well. (E10, E2475).

The new report showed the results of Mr. Sullivan's "Stage 2" and "Stage 3" analyses compared to the "Stage 1" results shown in his August 2013 report. The new results varied widely – showing peaks of 121 $\mu g/m^3$ for NO_2 in Stage 3 (64 ppb) and 147 $\mu g/m3$ and 156 $\mu g/m^3$ in Stage 2 (64 to 83 ppb). Interestingly, the contribution from the station made up almost 30% of the lowest overall reading in Stage 3 and 10% of the 147 $\mu g/m3$ reading, but was only 1% of the highest reading – showing the wide variation the modeling produced. Similarly, nearby homes were shown as falling in the range of 120-130 $\mu g/m^3$ in his Stage 2 analysis (which is *higher* than in the Stage 1 analysis, despite his use of *lower* background levels). In his Stage 3 version, the homes were shown as being at about 100 $\mu g/m^3$. (E2373-E2375). Even those lowest levels convert to 53-63 ppb – which, as discussed in the Coalition's Brief, are still within the range of values in which current real-world studies have shown adverse health effects.

This report again does not show the roadways (so there is no way to determine if there is a NAAQS violation in the general area), nor does it show the actual readings at locations off the Mall or the breakdown of the station contributions to those values so, again, one cannot compare the analysis in the original reports and this latest version. Nor does it provide *any* information on "rural dispersion" numbers even, though, originally, the Protocol stated that approach was *required* by the EPA, again making it impossible to compare results across all of the reports.

Dr. Cole testified that Mr. Sullivan's way of applying the OLM in his Stage 2 and Stage 3 analyses was: a) not authorized by the EPA; b) was not scientifically valid if evaluated on its own merits; and c) used factual assumptions with which he disagreed.[9/]. The Hearing Examiner discussed many of those points as bases for finding uncertainty with respect to this third report and reasons why he found its results to be "problematic" particularly with respect to the Stage 3 analysis (E103-E108, E115-E118).

With respect to $PM_{2.5}$, the final report (E2378) showed a peak level of 10.77 $\mu g/m^3$, after it once again reduced the background value to 9.8 $\mu g/m^3$. The peak station contribution *alone*, though, in the new report, is now .92 $\mu g/m^3$, a full 8.5% of the total. Costco's brief (p. 10) cites to a much smaller contribution at the homes and school but those values are taken from Mr. Sullivan's first report that he has otherwise long since abandoned. His last report provides neither precise total values nor station contributions for the homes and school so there is no way to compare the two reports or to determine if the wide variability in the NO_2 results would also apply here. In any event, $PM_{2.5}$ values in the range of 9.8 are well within the range where health effects appear in studies the Coalition Brief cites. Adding more pollutants increases the potential for harm.

[9/] The Hearing Examiner also accepted criticisms raised by Dr. Cole with respect to changes to the "MOVES" modeling and use of paired backgrounds. (E92-E96, E99).

c. Conclusions of the Hearing Examiner

The Hearing Examiner reviewed *all* of the evidence presented by Mr. Sullivan, despite the Opposition's requests to exclude some of it on legal and/or procedural grounds. Even giving Costco every leeway, he concluded (E160-E166) that it had *not* met its burden to establish what emissions levels would be, whether those expected levels would exceed those the NAAQS indicated could be harmful, and whether, the evidence taken as a whole, would show no adverse health effects from those emissions. He noted that ZTA 12-07 set a minimum buffer but left it to the Hearing Examiner to decide if a larger buffer was needed when such a large station was being proposed so close to the uniquely sensitive population at Stephen Knolls.[10/] (E161, E165).

He did not accept all of the Opposition's criticisms of Mr. Sullivan's work, but he found merit to many and concluded that Mr. Sullivan's constant methodology changes, when combined with inherent uncertainties in modeling (up to *50%* according to the EPA), "left the likely levels of NO_2 and $PM_{2.5}$ close enough to the impactful level to make the likely health effect debatable." The fact that each change was made to meet a revised NAAQS or to counter the Opposition's evidence added to his skepticism. (E87-E91, E107-E108, E119-E120, E162, E164). Moreover, the Opposition had argued that several other changes in assumptions could have easily raised the Stage 2 levels to near or above

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[10/] Scaling up the 300-foot buffer by the 3.3 times that 12 million gallons exceeds 3.6 million creates a presumptive 1,000-foot buffer which the station could not meet.

the NAAQS. (E2584-E2585, E2590-E2591). Mr. Sullivan chose not to test the effect of those variations – but that hardly means that his values were "not disputed," (Brief, p. 9) much less that the Hearing Examiner had accepted either the Stage 2 or Stage 3 values he supplied in his rebuttal report.

The Hearing Examiner further noted that the case for health effects with area-wide emissions below the NAAQS peak level of 100 ppb for NO_2 was made, not just by the Opposition, but by the EPA administrator in the actual NO_2 Rule. Thus, he was not ignoring the NAAQS; rather, he was *applying* the NAAQS as the EPA intended. He also relied on statements of the American Lung Association that discussed studies post-dating the NO_2 Rule and noted that the World Health Organization recommended an even lower standard of 10 $\mu g/m^3$ for $PM_{2.5}$, which, while not binding, supported the view that it would be inadvisable to allow the levels Mr. Sullivan projected. (E162-E164).

The Hearing Examiner, and the Board accordingly, reasonably concluded that Costco's evidence that area-wide monitor readings nationwide did not appear to exceed the 100 ppb level for NO_2 was not sufficient to show that that peak level might not be exceeded in this micro-location, in light of the many uncertainties that affect modeling versus the real world. (E164-E165). And, in any event, they found that, even if the NAAQS level was not exceeded, the evidence taken as a whole (including studies showing harm below that level and dealing with interactions between pollutants that the NAAQS did not address) indicated an undue risk from placing the "perfect storm" of

pollution created by this station so close to "extremely vulnerable children" at Stephen Knolls and the other uses in the neighborhood and on the Mall. (E165). The discretion given in the Special Exception requirements means that the County need not approve a use if there are "significant risks of non-inherent adverse effects" particularly to a population, such as those at Stephen Knolls, that are unusually susceptible (E165-E166).

3. Traffic, Pedestrian Safety, And General Compatibility

a. Evidence

This evidence is discussed by the Hearing Examiner at E79-85 and E169-E185. The station concededly would not result in a violation of the Adequate Public Facilities test with respect to traffic outside the Mall. Costco's expert, Wes Guckert, also testified that based on one form of traffic measurement - the Critical Lane Volume - the Mall would operate at "Level A," meaning "minimal or no delay." (E2597). He also opined that the flow of cars through the already-crowded Mall parking lots would not cause pedestrian safety issues or enough added traffic so as to become a "nuisance," taking the position that only total gridlock lasting for hours would be such a nuisance. (E171-E172). He also testified about the number of idling cars to be expected and how many could fit in the station before overflow would impede Ring Road traffic. (E173-E175).

The Opposition provided voluminous testimony and exhibits to contradict Mr. Guckert's testimony. It showed, *inter alia*, that traffic volumes projected by Mr. Guckert were too low (which could also affect Mr. Sullivan's models). (E2533-E2542), Evidence

was also presented about existing traffic and safety issues within the Mall, and the effect on congestion of even relatively small amounts of additional traffic. (*See* E2052 *et seq.*, Ex. 376 (thumb drive with video clips included in Ex. 375); E2125, 2134 (Federal Highway Administration report describing exponential increases in delay from small increases in volume), E2347 (traffic observations at Mall over Christmas)). KHCA also showed that Mr. Guckert's exhibits, like Mr. Sullivan's report, had glaring calculation errors (E76, E2596), and that queueing in the real world would likely take up more space and create more congestion than projected. (E77, E177, E181). Finally, KHCA showed that the County was making major efforts to reduce the growing volume of pedestrian accidents in parking lots. (See E175-E182, E2089, E2091).

Costco's "rebuttal" testimony, using a different method of analyzing congestion and delay, actually showed that rather than operating at Level A, intersections at the Mall entrance were actually at levels C through E and a critical intersection was projected to fall to Level "F" (failing) if the station were added. (E175). The analysis also showed that even a small underestimation of traffic volume by Mr. Guckert (which he conceded might occur (E1150-E1152, E1154)) could result in much longer delays.

b. Hearing Examiner's Conclusions

The Hearing Examiner stated initially that the traffic-related requirements in Sec. 59-G-2.06(a)(2) applied as much within the Mall as outside it and neighbors could be adversely affected as they used the Mall itself, not just surrounding roads. (E559-E560).

The Hearing Examiner noted that Mr. Guckert's credibility was undermined by several errors and rejected his assertion that only total gridlock could constitute a nuisance. (E182-E183). While, again, not accepting all of the Opposition's points, particularly since it did not have expert testimony, the Hearing Examiner did find the placement of the station would create "additional interactions between vehicles and pedestrians, some additional delays and some additional inconvenience in the neighborhood, and thus will add to the incompatibility of use at the particular location." (E184-E185).

STANDARD OF REVIEW

The decision on whether to authorize a particular use as a Special Exception is plainly committed in the first instance to the discretion of local officials. The standard for review of the decision of a local administrative body "is narrow; it is limited . . . to determining if there is substantial evidence in the record;" *i.e.*, if the issue is "fairly debatable" and whether "the administrative decision is premised upon an erroneous conclusion of law," *Montgomery County v. Butler*, 417 Md. 271, 283, 284, 9 A.3d 824, (2010). The courts "proceed from the premise that an agency's decision is prima facie correct and presumed valid," *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169 (2001) and do not engage in an "independent analysis of the evidence," *Armstrong v. Mayor of Baltimore*, 410 Md. 426, 444, 979 A.2d 98 (2009). Both the fact finding and the inferences drawn therefrom are viewed in the light most favorable to the agency if supported by the record. *Schwartz v. Md. Dep't of Natural Res.*, 385 Md. 534, 554, 870

A.2d 168 (2005). The standard remains the same when further appeal is taken from the decision of the Circuit Court affirming the Board.

Deference to that discretion is particularly warranted in reviewing decisions of Montgomery County on special exceptions. As described in *Butler*, 417 Md. at 294, Montgomery County has an unusually stringent standard for judging compatibility with a surrounding neighborhood. While Maryland law generally assumes a presumption of compatibility for special exceptions, Montgomery County, added Section 59-G-1.21(a)(2) to explicitly disavow that assumption:

> [F]eeling that the "effect of the court cases [referring principally to *Mossburg v. Montgomery County,* 107 Md. App. 1, 7-8, 666 A.2d 1253 (1995)] has been to shift the burden of proof in a special exception proceeding from the applicant to the community," [the Council Committee] recommended in 1999 adding this language purporting to address how the courts had to that time described the "presumption of compatibility" with regard to special exceptions, because the "Council's original understanding of a special exception need[ed] to be restored."

Butler, 417 Md. at 288, fn. 14. The Court agreed that Montgomery County was entitled to adopt a more stringent standard, 417 Md. at 300-04, and further approved the Council's definition in Section 59-G-1.2.1 of "non-inherent adverse effects" as including "adverse effects created by unusual characteristics of the site." 417 Md. at 304. "It is for the zoning board to ascertain in each case the adverse effects that the proposed use would have on *the specific, actual surrounding area.*" (Emphasis added). 417 Md. at 305. In endorsing the County's right to use its own approach, the Court made clear that, contrary to Costco's Brief (p. 26-27) neither *Mossburg* nor *People's Counsel for Balt. County v.*

Loyola College in Md., 406 Md. 54, 956 A. 2d 166 (2008), were controlling law in Montgomery County.

ARGUMENT

KHCA adopts the standard of review and the legal arguments advanced by the County and the Coalition. It writes now only to emphasize a few major points.

I. There Is Plainly Substantial Evidence To Support the Board's Judgment

Costco received every chance to make its case and was allowed to repeatedly revisit its analysis to try to salvage its position.[11/] The Hearing Examiner displayed a masterful grasp of the evidence during this extraordinarily lengthy hearing and in his 262-page report synthesizing 37 days of testimony. The recitation above could only touch on some of the many disputes the Hearing Officer resolved in his detailed and cohesive report. On the record here, it verges on the fatuous to contend that a reasonable person could not have reached the conclusions he did.[12/] Indeed, the Hearing Examiner noted that he initially assumed Costco's position was correct (E12-E13); his final decision to

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[11/] KHCA maintains its view that Sullivan's February 2014 report should have been excluded based on its arguments noted above; the Hearing Examiner's decision to include that testimony gives Costco all that it is entitled to and more.

[12/] Costco's arguments in its Brief on the traffic issues (pp. 27-33) are all based on its suggestion that the Hearing Examiner could only consider traffic and safety issues in the neighborhood outside the Mall, but the Hearing Examiner made clear that he viewed that criteria as applicable within the Mall as well. Read in context, it is clear that his findings relate to problems that the residents would encounter when trying to use the Mall and are readily separable from the emissions issues.

recommend denial could only be based on a superior evidentiary showing by the Opposition. Those factual findings are precisely the ones that this Court has made clear are entitled to substantial deference. The Circuit Court correctly gave that deference. (E512).

II. Costco Failed to Prove an Absence of Adverse Health Effects.

By contrast with the errors and carelessness shown by all three of Costco's primary experts (Sullivan, Chase, and Guckert), the analysis by the Opposition's experts and its learned lay witnesses was crisp, coherent, and persuasive in showing that health effects could occur at any of the levels asserted by Costco. (E18). It used the most up-to-date and comprehensive data available and it applied the *full* scope of the analysis in the NO_2 Rule, not just the peak limit it set. As such, the Board had ample reason to find that Costco had failed to meet its burden of proof with respect to the specific facts of *this* application at *this* location. Just as a tortfeasor takes his plaintiff as he finds him, so too must a Special Exception applicant accept the neighborhood it seeks to join. *Butler*, 417 Md. at 305. There are many places a mega gas station with long lines of idling cars might be acceptable, but the County could reasonably find that a location close to its sickest children, a swim club, and a number of homes is not one. The Circuit Court correctly agreed. (E511).

III. The County's Actions Are Not Preempted.

The lack of merit in Costco's arguments is clearly shown by the fact that its primary argument – preemption – was raised on appeal for the first time. Until then, Costco has merely opined that it would be unfair, or arbitrary, or capricious for the Hearing Examiner not to adopt its reading of the NAAQS as binding guidance. (E612-E613, E616, E618). But, as shown in the Coalition's brief, it *never* argued that the mere existence of the NAAQS, or the State's adoption thereof, *preempted* the County's right to make its own analysis. Although Costco's counsel accused the Opposition of shifting its ground (E647), the reality is that it is Costco that has continually shifted position – first, as to the evidence and now the law. It is far too late to raise this argument for the first time. *Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 3-4, 785 A. 2d 747 (2001).

Nor would the argument have merit, even had it been timely raised. (E509-E510). No evidence was presented that either State law or the State agencies ever intended to regulate gas stations by way of the NAAQS and its permitting process. To the contrary, as Mr. Sullivan noted and Costco's brief agrees, the NAAQS approval process does not apply to small sources such as this gas station. (E66, Brief p. 8, fn. 4). If it did apply, as the Coalition's brief explains, other constraints would have limited Costco's ability to emit pollutants long before it reached the NAAQS limit. In any event, Costco does not provide a detailed analysis of any purported conflict between state provisions and the decision here, much less show a pervasive scheme that creates field preemption.

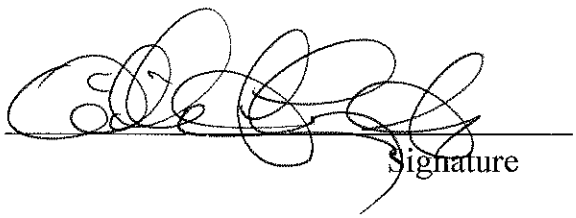
Nor is there any conflict with the NAAQS limits in any event – as the Hearing Examiner's report makes clear, Costco has ignored the fact that the NO_2 Rule intends to keep neighborhood exposures far below the NAAQS "peak" limit and that the EPA has clarified that it did not intend to bar local authorities from imposing more stringent limits in unique situations. *Sierra Club v. EPA*, 705 F.3d 458, 463-64 (D.C. Cir. 2013).

CONCLUSION

The decision of the Hearing Examiner was thorough, addressed all issues, fairly evaluated the record evidence, and properly applied applicable law. The Board of Appeals correctly agreed with his recommendation, and its decision should be affirmed.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8995 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing and type size requirements stated in Rule 8-112.



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