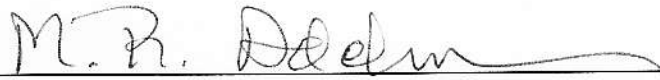


Attachment T: Framework: Outside the Box

A handwritten signature in black ink, appearing to read "M. R. Adelman", written over a horizontal line.

Mark R. Adelman, Ph.D.

## **FRAMEWORK: OUTSIDE THE BOX**

*by*

Mark R. Adelman, Ph.D.

Webmaster, The Stop Costco Gas Coalition [1]

In what follows, the author attempts to call attention to factors related to how, while decisions on Costco's Special Exception application (S-2863) are being made on the playing field defined in the County Code, our society is simultaneously struggling with this matter outside the box defined by the playing field.

This filing is written by one person, the author, who chooses for the rest of this piece to refer to himself as "MRA". MRA is a member of the Stop Costco Gas Coalition (SCGC), of the Kensington Heights Civic Association (KHCA), and of our society. MRA chooses to refer to all of the other members of these various groupings as "we", occasionally with some clarification; for example "we, as a society". These constructs are used in the hope that you, "the reader", will follow him outside the box in thinking about the issue of S-2863.

The process by which S-2863 is being decided is a quasi-judicial and socio-political one, common in how our society decides many such issues. It is a battle (or a combative game) fought in stages in a series of arenas, with several sets of rules (explicit and/or implicit). Frequently it takes us many years to reach decisions in such cases; often no final decision is actually reached until long after those present at the start of the battle have passed from the scene. The reader is probably aware of other such protracted (even ongoing) battles: the societal struggle over smoking, the environmental wars, and discussions of invasions of privacy come to mind.

The battles are frequently highly asymmetric, involving some entities that have very extensive resources (time, money, political power, apparent authority, and/or large numbers of actively involved members) and some entities that do not have such resources.

MRA is writing this at the end of an early stage of the process, in which we (a few active members of SCGC) have struggled to prepare a series of filings intended to refute the filings that Costco has made in support S-2863. These filings (both Costco's in support of S-2863) and ours (and those of others who oppose S-2863) will be evaluated by professional staff of the Montgomery County Planning Commission. They will provide their analyses to the Planning Board, which will in turn provide its findings to the Hearing Examiner. After the Hearing Examiner issues a decision, one or more appeals will be considered. The process may even extend to formal legal procedures as suits are brought and fought. Many years later there may be class action suits - if aggrieved citizens (or their descendants) chose to bring them.

So it is much too early to "see" how this process will actually play out. But MRA wishes to make some observations about the process to this point.

One could argue that the process should proceed in a logical manner: first the technical stage (now at the planning commission staff level), then the quasi-judicial, then the socio-political, and then the legal stages. But that is already not the sequence. The battle has already been going on for at least four years (since County officials began discussions with Westfield and Costco about bringing Costco into the County to accrue economic benefits for the County, etc.). Many are already tired of the battle, despite the fact that it is only just beginning. There are already expressions of exasperation - in the media and the blogosphere - that, for example, the delay is unfair to Costco, that "it is just a gas station!", that this is a NIMBY issue, and so on. The exasperation will surely grow and the diatribes will intensify.

MRA wishes to focus here on what we have learned, from our readings and our discussions with planning commission staff, as to the inadequacies of the County Code and the instructions that guide the professional staff (they are highly trained, make use of voluminous books, rulings, etc.) as they evaluate how the various filings do or do not speak to the elements of the Code. The Code is our (society's) Code: it is not simply the County Council's Code (although they, via the staff that serve them, wrote the Code): we elected them and we are supposed to consider whether or not we approve the laws under which we as a society operate. MRA (and others in the SCGC) have found what we regard as serious defects in the Code and it seems appropriate to call out just a few (only five) of these now.

1. The Code is nearly silent on matters of public health. The very word "health" is mentioned only once in all the sections of the Code on which initial decisions regarding S-2863 must be reached. The Code is so inadequate in the matter of public health that it practically encourages the situation in which the applicant (Costco) feels it can meet the requirements of the Code by filing a four page letter from a "health consultant" who purports to understand citizen concerns but finds them groundless. It forces citizen activists to respond with a rebuttal health filing that, while far more extensive and detailed than Costco's "health letter", is in our own view so far from how the discussion of this fundamental issue should be decided that we ourselves are dissatisfied. Even more problematic is the fact that it is nearly impossible to state clearly how Montgomery County actually deals with issues of public health - and the extent to which it is forced to rely on rulings/guidelines issued by State and Federal agencies (like the EPA) that are themselves struggling to keep abreast of scientific advances that are directly relevant to the very health issues that concern most of the citizens who oppose S-2863.

2. The Code encourages a kind of gamesmanship that is offensive. We (SCGC) have commented quite caustically, in our filing rebutting Costco's Land Use Report, at the attempt by Costco to define the "neighborhood" as including the Mall, but excluding the Kensington Heights community. That planning staff agree with our definition of neighborhood (and disagree with Costco's) does not change the anger we experience when we consider/reconsider what Costco's definition of neighborhood implies about Costco's attitude toward the community into which it has moved.

3. The Code contains terms that by their very nature force the construction of processes for evaluation that are almost insanely complex and cannot be considered to be "common sense", no matter what anyone's definition of common sense may be. The issue of evaluating "neighborhood need" is one that comes immediately to mind. The Code requires the applicant to "prove" that the use it proposes (the mega gas station proposed for the Westfield Wheaton Mall) meets a "neighborhood need". In our rebuttal of Costco's Land Use Report we attempted to explain how, by virtue of the reality that it is almost impossible to define "need" so that all agree, the Code has forced the Planning Commission to create a method by which "need" can be quantified. The method is called "market analysis"; while MRA does not fully understand market analysis, he understands it well enough to judge it a truly bizarre way in which to address the issue of need.

4. In preparing our rebuttal of Costco's Traffic Impact Analysis (TIA, also required by the Code and the mechanisms by which the Code is to be met), we had extensive discussions (with the planning staff) of the details of a TIA. These educated us sufficiently to understand that most - but not all - of Costco's TIA is valid (within the rules of the game for the box in which the game is being played now). But the discussions also enable us to understand why the many TIAs that have been filed as our County has developed have lead to a situation in which essentially all of our traffic network is in compliance with the rules, but we all spend many hours dealing with unacceptable levels of traffic congestion. The rules for preparing a TIA and deciding whether the data produced satisfy the requirements of the Code are simply not appropriate. If we wish our society to "work", we need to modify the rules. It is not necessary to start over; we just need to modify them.

5. As a result of the passage of ZTA 12-07, the Code now specifies (Sec 59-G-2.06 (b) (1):

*"After August 13, 2012, the area identified by a special exception application for a new automobile filling station designed to dispense more than 3.6 million gallons per year must be located at least 300 feet from the lot line of any public or private school or any park, playground, day care center, or any outdoor use categorized as cultural, entertainment and recreation use."*

In our discussions with planning staff, we have come to understand that this language is considered to speak to the issue of "siting" of the proposed gas station. In other regulations that speak to the "siting" of schools (these include some EPA documents and other regulatory pieces; the precise names of these other documents is not important here), there is a stipulation that schools must not be sited within 1000 feet of such a very large gas station. As discussion of the apparent conflict between these two stipulations of siting (which planning staff must consider) unfolded, we were dismayed to learn that "siting" is understood to have a temporal component. Specifically, while it may be decided that a school cannot be built near a pre-existing gas station, it may also be decided that gas station can be built near a pre-existing school. We wish we were mistaken on this, but the point seemed quite clear. Assuming so, this seems to us to be insane. But that appears to be how the Code, etc. will be interpreted and will thus impact the decision in the case of S-2863. Thus this matter (the temporal nature of "siting" regulations) becomes yet another example of where we as a society need to rework the Code and all the other pieces

of the tangle of rules and regulations by which we reach decisions in such complex, yet very important matters.

MRA concludes by thanking the reader for "sticking with it" to this point. He asks that the reader consider the above and, as the process of deciding on S-2863) plays out, consider contributing to the public discourse that is to come. An informed public discourse will be vital to coming to some consensus about S-2863. And about many matters that are much more important than "just another gas station".

## **ENDNOTE**

1. The Stop Costco Gas Coalition was formed in October 2012 by a group of citizen-activists who were concerned that only a small segment of the public was following the Costco mega gas station issue. The SCGC website ([www.stopcostcogas.org](http://www.stopcostcogas.org)) has a large amount of information about the application, background material relevant to understanding the Special Exception process, references providing information on citizen concerns, and a listing of the members who have joined the Coalition.