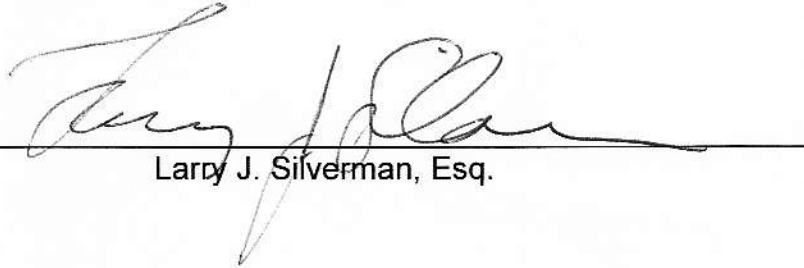


Attachment A: Relevance of ZTA 12-07



A handwritten signature in black ink, appearing to read "Larry J. Silverman", is written over a solid horizontal line. The signature is fluid and cursive, with a long horizontal stroke at the end that extends across the line.

Larry J. Silverman, Esq.

**The New ZTA and Costco's Latest Application for a Special Exception
An Outline of Concerns**

**prepared by
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January 2, 2013

What does the new ZTA which is now law, mean? And how should it influence the conduct of the Planning Commission and the Appeals Board? We need to look at this ZTA not as a political event in a long chain of political events but as the law of Montgomery County. Has the Planning Commission formulated a legal interpretation of this ZTA? Have planning authorities developed a policy matrix for carrying out the intent of this law? Could they share it?

We have an interpretation of this law which would bar construction of the proposed mega station as a summary matter, based both on clear intent of the law and on raw numbers.

Size matters: The basic message of the ZTA is that size matters when it comes to gas stations. The law references one size, 3.6 million gallons + per year. It instructs zoning and planning authorities to treat larger stations differently from the typical stations of Montgomery County. The message to planning authorities is to give these larger stations much greater scrutiny, not judge them by the same standards that were applied to the 26 smaller gas stations in the neighborhood over the years, as they faced zoning hurdles.

How much does size matter? There was great uncertainty in the Council and in the Planning Board as to this question. So the Council drew a line at 3.6 MGY. They were satisfied by evidence that stations bigger than that were potential hazards to children and others nearby. They therefore used their best judgment to come to a conclusion based on the information they had seen, that regardless of a company's testimony from paid experts, any closer than 300 feet is prohibited. The applicant was denied the opportunity to argue that less than 300 feet from people was a safe distance.

Council was strongly motivated to protect schools. Council members referenced gas stations that had recently located too close to schools. The Council did not single out the Stephen Knolls School. Council members expressed the view that they could not decide a pending case. And therefore although they heard testimony on the Knolls School, they did not pass on how close a gas station should be to it. In referencing schools for special protection, the Council necessarily established its minimum protections in reference to average or typical schools and playgrounds near gas station of 3.6 million gallons. What if the school held a super-sensitive population? Clearly by establishing a minimum volume of gas sales for typical schools, the Council invited zoning and planning to add protections for atypical schools such as Stephen Knolls. Otherwise the action would make no sense.

In addition to size, **Distance matters**. Buffers are good. Council established a buffer of 300 feet, for 3.6 MGY, as a minimum protection for County owned and other schools and recreational facilities, as well as hospitals and other sensitive uses. What if the volume tripled to 12 MGY? Surely the planning agencies could triple the buffer to 900 feet, as a matter of good

science and common sense, especially when the affected population was many times as sensitive as the general population.

The Council did not have the expertise or the opportunity to rule on every case and made an effort not to rule on the instant case.

The reasoning behind the buffer is **Public Health**. Council found a public health risk to people in certain land use categories within 300 feet of a gas station a third the size of the proposed Costco. It did not make residences part of the places subject to the minimum. And with some reason. Council had very little information as to the impact of such a rule county wide, and was reluctant to pass a hard and fast limit under the circumstances. The Planning Commission provided very little information and no real advice on this point. Council's purpose in focusing on schools which have been the center of US EPA activity in this area, was not intended to say that the health effects on people in covered land uses would be any different from the health effect on people not in covered areas. Council instead relied on the common sense of the Planning Commission, to protect public health generally. Under the latest Costco plan, the station will be within 150 feet of residences, half the 300 foot buffer for other uses. It was not and could not be the intent of this law to subject people in houses to risks judged by Council to be unacceptable and intolerable to people in schools and playgrounds, except that the buffer is cut in half and the size of the facility is tripled. Similarly, the employees and shoppers of Costco will be subjected to even greater risk as a result of Costco's decision to allow no buffer between their lungs and the biggest fueling station in Montgomery County. The ZTA was not intended to cover such abuses.

Granting a Special Exception in this case will set a precedent for the Montgomery County for many years to come. Will there ever be a neighborhood as close to a mega gas station as Kensington Heights is to the Costco behemoth? Will there ever be a school or medical facility that will argue successfully for a buffer in excess of 900 feet because of the sensitivity of its population? Is the Planning Commission willing to establish such precedents? Especially in light of the clear direction of the ZTA to closely scrutinize big stations and to equal or exceed the minimal and beginning protections established by Council.

We believe a clear focus on size and distance compels to Planning Commission to recommend rejection of this application.

During the course of this struggle the EPA issued new rules for ultra fine particulates that were not in effect when Costco's experts performed their calculations. During the same time a number of new and important medical studies came out demonstrating still newer risk factors to populations near gas stations, even average gas stations, some of which studies will not be reflected in EPA rules for months or years to come. Knowledge is changing but the direction weighs against allowing a facility of this size to be squeezed into the space provided. Given the trends as well as the uncertainties, we believe the Planning Commission should come out against this proposal in the strongest terms possible.

TESTIMONY OF LARRY J. SILVERMAN, ESQ., BEFORE THE MONTGOMERY COUNTY PLANNING BOARD ON THE SPECIAL EXCEPTION REQUEST BY COSTCO TO BUILD A GIANT GAS STATION ON THE WHEATON MALL

FEBRUARY 28, 2013

My name is Larry J. Silverman. I reside in Takoma Park, MD. For more than 40 years I have made my living in one of the most vibrant sectors of Montgomery County's economy, environmental and public health protection. I am a lawyer, not a scientist but I have participated in important policy and regulatory decisions in Maryland and across the country, including the formulation of the Clean Air and Clean Water Acts, and many other related pieces of legislation, and development of the overriding consent decrees for WSSC and DC WASA, and many other similar issues. Shortly after moving from DC to Maryland I became a founding board member of the Anacostia Watershed Society. Later became president and remained a long time advisor. I was chairman of the Board of the Patuxent Riverkeeper, and legislative director for Clean Water Action among other groups. Mostly over the years I have been in private practice, helping many small businesses with innovative technology carve out a place in the environmental protection industry. I have also helped municipal governments, some in Maryland, make plans and find resources to deal with major environmental challenges. I was appointed by County Executives Duncan and Leggett for consecutive three year terms on the Montgomery County Water Quality Advisory Group, and served as chairman for three years. For the last 18 years I have been an adjunct professor of environmental law and policy at Johns Hopkins University in Baltimore and DC. I have been at it long enough that I not infrequently meet my former students in the National Capitol, at agency and professional meetings, holding responsible jobs in the environmental protection and infrastructure industry. They earn their livings in industry, academia, government, and the non-profit sector trying to keep the air and water cleaner and healthier.

About three years ago, my long time family friends, the Sheveiko's of Melvin Court in Kensington Heights, called to tell me that Costco was proposing to build a gigantic gas station at the top of the hill in their backyard. The neighbors were meeting to discuss it. And would I attend that meeting. From that day to this Costco Gas has been one of my major professional occupations. Last year six of my graduate students attended a Costco open house where technical staff were available for questions, and then submitted papers about it. I sat in on a six hour meeting between our meteorological and air pollution expert, Dr. Henry Cole and Costco's expert, Mr. David Sullivan. I have been studying mega station locales in other parts of the country, and have studied voluminous reports produced by other members of the clean air coalitions that have emerged in connection with the Wheaton project as well as Costco's

voluminous reports. When visiting California recently I took time to check on the Redlands station proposed there.

I am here to urge a recommendation of denial of the Special Exception sought by Costco.

1. STAFF'S CONCLUSION THAT THE APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROVING THAT THE MEGA GAS STATION WILL NOT HARM HEALTH DESERVES YOUR SUPPORT:

A close reading of the staff's report demonstrates extraordinary diligence of the report's authors. They carefully examined the hundreds of pages of highly technical papers submitted by the applicants and the opponents. They met with and had in depth discussions with both sides. They posed questions of both sides and gave the applicants an opportunity to address lingering questions. They did their own independent research of the complex air pollution literature. They did not fully adopt the conclusions of either side. While I wish they had come down closer to our position on the issue of fine particulates, I believe that the independent course Staff took speaks well for their objectivity and fairness. There is no need for this Board to repeat the arduous lengthy process that staff engaged in. The Staff did its job well. The Board should support the Staff recommendation.

2. THE MARYLAND DEPARTMENT OF ENVIRONMENT ENDORSES BUFFER ZONES AROUND MEGA STATIONS AS "AN ADDED MEASURE OF PUBLIC HEALTH PROTECTION":

In a recent letter (attached) to the Chairman of the Economic Matters Committee of the Maryland House of Delegates, the MDE acknowledged that its current regulatory scheme was not adequate to deal with the threats posed by mega stations, and endorsed the concept of buffer zones between mega stations and people. The Department discusses the tremendous difficulty of assessing all the risks from the toxic fumes generated by mega stations and concludes, "Because of these difficulties the Department has not developed a risk-based regulatory scheme for permitting large gasoline stations. We continue to rely on imposing technology-based requirements as our basis for protecting public health. Given this, the [thousand foot] setback requirement ... would provide an added measure of public health protection beyond what the Department approach now offers." One need not agree to a 1000 foot buffer to recognize that some buffer zone is advisable. This is the view of MDE and the overwhelming opinion of public health experts who have addressed this question in the peer reviewed literature.

In sharp contrast, Costco has argued essentially for no buffer zones. Indeed at various public forums it has boasted that a few of its mega-stations in San Francisco, Albuquerque, and other locations are as close as 40 or 50 feet from housing developments. Over the last three years I have repeatedly asked Costco representatives how close is too close. And never received an

answer, other than that 125 feet from homes is not too close. I have also learned from Costco representatives that the MC Special Exceptions board once approved a 12 foot buffer.

Your choice today is to adopt the position of the State MDE, the US EPA Office of Children's Health, and leading health scientists that buffers are appropriate public health measures, or Costco's view that buffers are not necessary.

3. ZTA-12-07 REQUIRES A RECOMMENDATION AGAINST THE SPECIAL EXCEPTION:

ZTA 12-07 requires a 300 foot setback between large stations and schools and playgrounds. Costco has made much of the fact that homes are not mentioned. Anyone who listened to the extensive debate in County Council or read the Council staff report knows that the whole issue was about public health. What sense does it make to say that a child in school deserves to have at least 300 feet distance from mega gas station fumes, but that a child at home, or a recovering heart attack victim, or a pregnant woman at home does not deserve such protection? It makes no sense at all. Why then did the Council not include homes in the protective buffer? The cynical view is that the Council wanted to appease public sentiment but allow Costco to proceed with its project. As I heard one person put it, the Council members held one end of the measuring tape as Costco moved its proposed station a couple hundred feet from the Kenmont pool, where healthy children play, and a couple hundred feet closer to the Stephen Knowles School, where very fragile children spend the bulk of their young lives.

There is a better interpretation. The Council did not have a clear picture of the effect of the buffer zone on the development of retail gasoline outlets. While they wanted to follow EPA guidelines regarding schools and playgrounds, they did not wish to impose constraints that did not make sense in particular cases. For example, suppose there were only or two houses within the buffer zone, rather than a whole neighborhood as in this case. Suppose further that the station was located in a part of the County with the cleanest air rather than, as in the current case, a location where background air pollution is likely very bad. Suppose that the homeowners had no objection to the station. Hypotheticals of this sort can be multiplied. That is why the Council left a measure of discretion on this question with zoning authorities. But when we have a case where there is dense population, the background air quality is much worse than County average, a school for handicapped children is close by, the station proposed is three times bigger than the Council definition of large – in such a case the letter and spirit of ZTA 12-07 would seem to require a denial of the Special Exception.

4. IF YOU SAY YES TO THIS PROPOSAL, WHAT WOULD YOU EVER SAY NO TO?

During recent hearings in Annapolis on gas station buffer zones, industry witnesses indicated that hyper volume stations were the wave of the future and indicated an interest in locating such facilities in the Georgia Avenue and Rockville Pike corridors as examples. They also

discussed the possibility of expanding existing stations in existing locations. This follows national trends. This proposal may be the first time you deal with mega stations, but it will not be the last. Do you really want to establish as a precedent that 125 feet from homes is OK? EPA recommends a 1000 foot buffer between mega stations and schools. Do you want to sanction a lesser buffer between a really big station and a school for really fragile students, many of whom suffer from respiratory problems? If you say yes today when will you say no?

There is a clear desire on the part of industry and real consumer demand for stations of this sort. The better way to handle this new economic and market development is to develop a comprehensive plan or set of guidelines for the County to accommodate such fueling facilities with minimal impact on public health. Until you do so you will have to address these issues case by case. What you do in this case will determine whether future proposals come to you prescreened for health concerns, or whether the word goes out that anyone with money for expert witnesses can locate facilities in nearly every commercial zone in Montgomery County. No one knows exactly where to draw the line, but it is obvious that this proposal in this case steps over it.

5. OUR EXPERTS ARE BETTER THAN THEIR EXPERTS:

In the course of the last two years I have had extensive dealings with Costco's principle expert, Mr. David Sullivan. I have great respect for him and for his ability to manipulate complex EPA models. Our own air pollution meteorological expert, Dr. Henry Cole, met and corresponded at length with Mr. Sullivan, and reached agreement on many points. They did not agree on other critical points, some of them very technical in nature and some of them philosophical. In general, as I think Dr. Cole will tell you, he believes Mr. Sullivan underestimates the risk. By and large your staff agreed.

Moreover, Mr. Sullivan, for all his qualifications, is not a health expert. Opponents have produced statements from two of the foremost air pollution public health experts on planet Earth. Dr. Marta Doval Minnaro of the United Kingdom, corresponding author of one the most recent and most cited peer reviewed articles on gas stations, has written recommending denial of the Special Exception. Costco has criticized Dr. Minnaro's work, but has not pointed to even one peer reviewed study indicating that buffer zones around gas stations are not advisable.

Closer to home, Dr. Patrick Breyse, a full professor at the Bloomberg School of Public Health at Johns Hopkins University, after studying Mr. Sullivan's reports, concludes:

Given the measures reported from studies and guidance documents I've cited here, and *based on my professional experience*, it is likely that this proposed COSTCO service station(as it is currently sited) will negatively influence the surrounding ambient air quality.... [Emphasis added.]

Dr. Breyse is clear that his opinion does not represent the official view of the Bloomberg School. Indeed, getting such views from such an institution or from the NIH or the National Institute of Environmental Health would require a long and expensive process. I hope in future years that government and industry will fund such a process. Still I was very struck by Dr. Breyse's professional affiliations. In addition to Hopkins, he served on advisory panels for the Environmental Protection Agency, the National Academy of Sciences, National Institute for Environmental Health Sciences, and the National Institute for Occupational Safety & Health. All of these institutions have extensive ties to Montgomery County.

And even closer to home, Dr. Maria Jison, a pulmonologist in the affected neighborhood, whose own children suffer from asthma, makes a compelling statement urging denial of the Special Exception.

So who are you going to believe? In my opinion it is not even close. But you do not have to make a positive finding that this proposal will injure public health. You only have to find that the applicant has not proven its case that it will not affect health.

6. CONCLUSION: RECOMMEND DENIAL OF APPLICATION

When the Planning Board considered ZTA 12-07, a number of members of the Board expressed frustration at being asked to decide complex matters of health and environmental science for which they were not qualified or prepared. I am afraid that this is one of the conditions of modern life. Imagine if you will that a member of your family, your child or spouse of parent, is gravely ill. Your local specialist doctor, a top professor at Johns Hopkins, the state agency with expertise in this area, and leading international experts all agree on a course of action. Other members of your family who have spent hours and hours studying the evidence also agree. Other people, with respectable but lesser qualifications, suggest another course. How will you decide? I expect you would exercise great care, thoughtfulness and common sense on reaching a decision. Well I hope you will bring the same qualities to this decision about this giant gas station and the people who will be breathing its fumes, as you would bring to the hypothetical case of an ill family member. If you do, I believe you will recommend against granting the Special Exception.

Thank you for the opportunity to testify.

Respectfully submitted,

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MARYLAND DEPARTMENT OF THE ENVIRONMENT

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Martin O'Malley
Governor

Anthony G. Brown
Lieutenant Governor

Robert M. Summers, Ph.D.
Secretary

Kathy Kinsey
Deputy Secretary

February 21, 2013

The Honorable Dereck E. Davis, Chairman
Members of the Economic Matters Committee
Room 231, House Office Building
Annapolis, MD 21401

Re: Letter of Information, House Bill 835: Environment – Retail Service Stations – Setback Certification

Dear Chairman Davis and Committee Members:

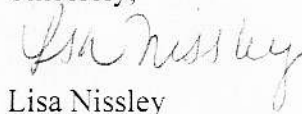
The Maryland Department of the Environment (MDE or "the Department") has reviewed House Bill 835 and we would like to provide some information regarding this bill. This bill imposes a setback requirement on new gasoline stations projected to sell more than 3,600,000 gallons of gasoline per year and subjects permit applications for such stations to public review.

From a protection of public health perspective, the Department is supportive of the principle of placing distance between air pollution sources and people. Under the current regulatory structure, all gasoline stations are regulated uniformly regardless of size or location and are required to install and maintain specific pollution capturing equipment. This is not to say that a gasoline station, once permitted, poses zero risk to the public. There are a number of petroleum based toxic air pollutants that are emitted from gasoline stations that pose some level of risk to public health from the delivery and dispensing of fuel and the idling of vehicles. The difficulties are quantifying that risk, especially the incremental risk beyond existing levels, and determining what risk level is acceptable. A further complication in assessing potential risk is that available tools do not capture very well the cumulative effects of multiple toxic air pollutants or the incremental effect a single pollutant from multiple sources may have on public health.

Because of these difficulties, the Department has not developed a risk-based regulatory scheme for permitting large gasoline stations. We continue to rely on imposing technology-based requirements as our basis for protecting public health. Given this, the setback requirement in House Bill 835 would provide an added measure of public health protection beyond what the Department's approach now offers.

If you have any questions, please contact me at 410-260-6301 or by email at lnissley@mde.state.md.us.

Sincerely,


Lisa Nissley

cc: George (Tad) S. Aburn, Jr., Director, Air and Radiation Management Administration

