

## Supplement to Legal Analysis re: Need Standard

The Stop Costco Gas Coalition fully accepts and adopts the prior legal analysis of the need statement submitted by attorney Michele Rosenfeld on behalf of the Kensington Heights Civic Association on April 9, 2012 as part of the filings in the prior, related Special Exception S-2794. The file and associated exhibits is being forwarded to you again for your convenience in reviewing the current application, S-2863.

In addition to the analysis set forth there, we note the following additional points with respect to *Lucky Stores, Inc. v. Board of Appeals of Montgomery County et al*, 270 Md. 513 (Ct. App. Md. 1973). This is one of the primary cases from which the broad language is drawn that applicants such as Costco in the present case rely on to “prove” that there is a “need” for their station within the meaning of the statute – and that, moreover, that “need,” despite the language in the statute has essentially nothing at all to say about the number of existing alternatives, their sales volume, and their sales capacity. A close reading of the case, though, as set out below, confirms that exactly the opposite is true and that its holdings and analysis are quite helpful to the opponents of the proposed Costco gas station.

In many ways, the case appears to be a mirror image of the present situation – down to the 25 other stations within the competing area (of about 4 miles in total length along Rockville Pike, similar to the 4-5 mile diameter for the study area here). The testimony there was to the effect that the existing stations were pumping nowhere near capacity, that they could readily add additional service and that no one was being required to wait in line to obtain service (just as here). The station owners who testified in opposition noted that their sales had been declining in recent years. Notably, the *only* witnesses testifying in opposition to the station were opposing gas station operators.

The applicant was a discount, members only, department store operation. The proposed gas station was part of a large “one-stop” shopping center for the company’s members and the company testified that gasoline sales were an essential part of that “one-stop” experience. The proposed sales volume was about 1.2 million gallons per year.

In response to the question of why is another store needed, the company’s answer was that its members did not shop at other stations and that persons using major gas company stations did not shop at its facilities. Further, the company had adopted the “one-stop” business model and wanted to present a uniform national image. The Board queried the company again, why does Rockville Pike “need another gas station?” The answer was “Memco [the applicant] needs it to serve its members. The Board member asked again, “*Why does the public need a new gas station on Rockville Pike?*” And, again, the company replied that it complied with their national policy. The Board member quit after determining that that was the company’s fullest response. (The Court of Appeals supplied the emphasis with respect to the Board member’s questions.)

Based on the testimony, the Montgomery County Board could not find a need for the station in that there were already adequate facilities to serve the Rockville Pike customers. It, therefore, *denied* the special exception request. The reported case is the decision by the Court of Appeals – Maryland’s highest court – to *uphold* that denial of the request. The primary question

was whether the actions of the County Board were directed at suppressing competition to protect the existing dealers or were more generally directed at the public health, safety, welfare, and morals. As noted, this case appears to be one in which the *only* concerns were those of the surrounding service stations and the effect upon their businesses. Thus, this presented the question in the starkest form of whether “need” should be taken as an absolute standard that could be used to preclude additional applicants from entering a market

The court’s discussion, accordingly, should be reviewed in light of the underlying context – namely, whether the County Board’s decision was purely economic protectionism or whether it dealt with broader concerns of the community as a whole and whether the existence of a new facility might be generally beneficial to that community, even if detrimental to one or more existing businesses. It is of significance that the Court, even using broader terms of “expedient, reasonably convenient and useful to the public,” found that the County Board acted appropriately in denying the Special Exception request to the proposed station. Here, of course, the opposition is *not* primarily from the other stations; it is from the surrounding community.

The Court of Appeals approvingly cited the lower court’s decision that noted that every decision denying an application on the basis of need must, to some degree, deny increased competition – but held that, unless the Board were allowed to “prevent the unreasonable and unnecessary accumulation of the same type of commercial establishment in the same general area,” “an absurd result would be reached whereby the Board could not possibly prevent the construction of any filling station along the commercial corridor of Rockville Pike.” The Court of Appeals went on to say that “the better view [] is to the effect that the lack of need for another gasoline filling station in the vicinity of other stations is . . . an important factor that courts have relied upon in refusing a permit for a filling station.”

Moreover, it is clear that that the Court is using “need” in the normal sense of overall lack of capacity, rather than merely whether the proponent can identify *some* constituency that might want the station. It noted that it had upheld denials of permits in the past where the Board acted, based on the number of nearby stations – ranging from five near the site with two on opposite corners in *Hoffman* case, to seven within 2500 feet in *Lightman* case, to eight within a 3.4 mile radius in *American Oil Company*. In each case, one can reasonably assume that the applicant could have shown the same sort of market “gap” analysis conducted here because, after all, if the applicant did not believe there was a niche that it could fill it would hardly have decided to invest its time and money in the site. But, the Court of Appeals did not assume that the role of the “need” analysis was merely to validate and ensure that a private entity would be able to operate profitably. Rather, it examined closely – and rejected – the proffered justifications.

It noted that the applicant had offered three grounds for its showing of “need” – the fact that the station would appeal to its members, the fact that it would sell gasoline cheaper than major oil company stations, and the fact that there were additional hazards in regards to some of the prior cases. As to the first, it noted that, despite questioning from the Board, the applicant could only state that its “members only” operation would benefit its members. The Board stated unequivocally, “*the ‘need’ is to serve Memco’s selling policy; it does not establish a need by the population in the general neighborhood.*” **That is exactly the explanation proffered by Costco as to its sales operation and, just as with Memco, it is clear that this**

**does not establish a “neighborhood need.”** In short, serving one’s members is a completely distinct goal from serving the local neighborhood -- and that is precisely the scenario at issue here.

Moreover, as shown in the accompanying factual analysis, the fact (to the extent that it is a fact) that there is some sales gap as regards the study area does *not* establish that this station will serve that gap or eliminate it with respect to the sales to the neighborhood. Rather, it merely proves that Costco will use its far-flung members to fill up and usurp any purported neighborhood need.

Further, the Court of Appeals explicitly agreed that the Board had appropriately exercised its discretion in considering “the rather extraordinary number of existing filling stations” (25 – the same as here in roughly the same area); the decline in gasoline sales, the fact that the existing stations could easily supply the population with gasoline, “there being no delays in supplying the public at the present time and ample facilities for the sale of additional gasoline.” Regardless of the fact that the evidence about existing conditions came from competitors, the Court held that it was reasonable for the Board to accept and rely upon that testimony.

The Court also looked at the existence of other discount operators in the area (2 of the 25 stations) as indicating that such a need was already satisfied as well. Here, there are also other stations that tend to fill the role of a discount operator, including the Freestate on Veirs Mill, the Econoway in Kensington, and the G&G Service Center on Georgia. The Court did not assume that all of the other stations had to be similarly competitive on price; it was enough that a few stations might also fill that role. So, too, here, there are several stations that sell at the same price or within a few cents of the Elkridge Costco as an example, which indicates the same situation accepted by the Court of Appeals in *Lucky Stores*.

To be sure, at the end, the Court of Appeals indicated that Memco had failed to provide a number of pieces of information from which some actual need might be deduced – but none of that detracts from the fact that it found that evidence of substantial existing capacity to fill all of the possible needs was sufficient to uphold denial of the permit. In short, while the opinion does give the Board some degree of flexibility to ensure that it is not held hostage to the opposition of an applicant’s competitors, it most assuredly did not intent to cut the concept of “need” wholly adrift from any actual, demonstrable ties to a real lack of capacity already existing in the system.

To do otherwise would be, as the lower court in this case noted, leave the Board powerless to actually enforce any meaningful *need* requirement. Moreover, it would strip that requirement of any force in terms of serving as a counterweight to the statutory structure that precludes neighbors of a station from relying on the fact that it will *inevitably* adversely affect them in order to defeat the station. In the context of the special exception structure, it may make sense to conclude that a neighborhood that really “needs” another example of a particular service to supply the necessary capacity *for* that service must have to accept the adverse consequences thereof. But, where the neighborhood already has ample capacity to obtain the particular service, it surely makes no sense to impose more burdens on it to have an even greater excess capacity. We strongly urge the Hearing Examiner and the Board to return to *Lucky Stores* with a fresh eye,

to review its facts and its analysis, to consider how closely it resembles the present case, and to decide this case in precisely the same fashion.