

## How Costco Lost S-2863: Analysis & Predictions

*[Note: This analysis was prepared by the original Webmaster for the Stop Costco Gas Coalition. He was, at the time this report was prepared, Webmaster for the Mega Gas Station Setback Coalition. He will refer to himself throughout this status report, which was prepared in late March, 2015, as Webmaster. Webmaster wishes to make clear that references to Costco/Westfield/Leggett are used here because this is a report on a specific instance of a more generic problem. Webmaster's overarching concern relates to instances when any corporation thinks it can bully any group of citizens. And when it colludes with any other corporate bully and/or any public servant - elected or appointed - who chooses to put the desires of any corporate Goliath above the interests of the citizens who pay the taxes from which that public servant derives his/her salary. So this report is, in a more generic sense, about how X/Y/Z lost an attempt to bully citizens - in one specific situation. Webmaster reminds the reader of the adage that those who fail to learn from history are doomed to repeat it.]*

When corporate giant Costco first filed an application for permission to build a mega gas station (16 pumps; also referred to as a hypermarket gas station ) in a small parking lot in the southwest quadrant of a shopping Mall in Montgomery County, MD (in 2010), it was presumed to be a 'no-brainer' - a done deal. Westfield Corporation (another corporate behemoth and owner of the Mall) was strongly in support of the proposal, which was tightly-linked to the construction of a Costco Warehouse store in the same Mall quadrant.

Montgomery County Executive Isaiah (Ike) Leggett had - apparently - brokered the deal and assured both corporate Goliaths that they would encounter no problems. [Mr. Leggett had a checkered history of making such deals and, if things went south, walking away from them, denying any express wishes in the matter. He also had a history of reversing the mandated wishes of the electorate - in at least one instance reversing citizen intent as expressed by referendum.] Construction of the Warehouse Store did not need any kind of approval by County offices (other than perfunctory APFO evaluation) and, while gas stations must be approved by the county Board of Appeals (as a 'Special Exception'), there was no reason to doubt that the Board of Appeals (all political appointees of Mr. Leggett) would 'rubber stamp' the application. In an effort to forestall even the remote possibility that the Special Exception process might lead to a denial of Costco's application (to build the mega gas station), Leggett asked the County Council to pass a special (site specific) Zoning Text Amendment (ZTA) to give Costco the 'right' to proceed with its mega gas station plan without having to go through the Special Exception process (which in Montgomery County is rather complicated, see below).

Much to Leggett's surprise (and Costco/Westfield's astonishment), citizens lobbied the County Council - successfully - convincing the Council that the site specific ZTA should be defeated. It was, and Costco (with Westfield's support), was forced to file a Special Exception (SE) application (S-2794). While the SE process was in its early stages, citizens took the initiative away from the two corporate dinosaurs (Costco/Westfield) and the over-confident Leggett. The citizens persuaded a progressive member of the Council to bring forward a genuine (not site specific) ZTA (ZTA 12-07) that would require a 'buffer' (a safety zone) between any mega gas station and any of a number of 'sensitive land uses' (schools, homes, etc.). This

touched off a frenzy of actions by Costco/Westfield/Leggett. While the usual corporate lobbyists besieged the various Council members, Leggett had his County Lawyer prepare a position paper on why ZTA 12-07 should not be passed. The citizens in turn lobbied the Council heavily as well, pointing out that citizen concern was consistently about health risk and the proposed ZTA was directed at Health Risk (hence the notion of a buffer zone).

In the summer of 2012, the Council passed ZTA 12-07, which was a compromise that established a 300 foot buffer (between any gas station 'larger' than one selling more than 3.6 million gallons per year) and certain sensitive land uses - but not homes. [As one civic activist noted, sarcastically, "apparently people who live in homes don't breathe in".] Neither the citizens, nor Costco/Westfield/Leggett were happy but, as the Councilmember who proposed the original version of ZTA 12-07 observed, passing such legislation was rather like making sausage and thus not something that is pleasing to the eye.

With the passage of ZTA 12-07 (as a sort of minimum protection from the Health Risk created by the proposed mega gas station), the County Land Use Code (Law) was modified. The new regulations made it impossible for Costco/Westfield to put the proposed gas station where they had proposed. So they withdrew S-2794 and submitted a new application (S-2863, submitted in late 2012), proposing to cram the gas station into the same parking lot, in a location that met the new regulation but placed it much closer to the Costco store. [The 'new site' infuriated many citizens because, while it was further from a swim club, it was closer to a County school for children with serious health problems. (The failure of the inept Board of Education to take any position on the gas station application was yet another sign of how out of touch with taxpayer attitudes the BoE was - and is.) It was as much a problem for the nearby homes (no homes were covered by the new regulations) and it was obviously not Costco's preferred siting.]

Late in 2012, as Costco/Westfield/Leggett prepared for the SE process, a new group joined the fray. Named the "Stop Costco Gas Coalition" ([www.stopcostcogas.org](http://www.stopcostcogas.org)), it sought to involve citizens from throughout the County. [The other civic groups involved, which had done so much work in blocking the Goliaths, were neighborhood associations (primarily Kensington Heights CA, <http://kensingtonheightsmd.org/>) and had not attempted to involve the broader 'community'.] The formation of SCGC turned out to occur at a pivotal time - another example of serendipity (see below). The leadership of KHCA was in flux and could not focus on the initial stages of the SE process, so SCGC stepped in - essentially 'holding the fort' - although that was not the intent when the coalition was formed.

Here it is appropriate to explain how SE applications are processed in Montgomery County, because, unless the reader has an overview sense of the process, s/he will be baffled by what went on (and may in fact be baffled even if they DO know how the process played out). Any application for a Special Exception (for example a request for permission to build any gas station) is initially submitted to the Board of Appeals, which assigns the application a number (in this case, S-2863) and sends the application packet to the Planning Board. The application is studied by the Technical Staff of the Planning Board (often this involves discussions with the Applicant and/or any Opposition). The professionals of the Planning Staff then make a recommendation (approve/deny w/w.o. conditions) to the Planning Board. That is

step one in the process. In this case, the Planning Staff recommended denial, based primarily on concerns about health risk.

In step two, the Planning Board considers all available information (including the recommendation of the Planning Staff) and holds a public hearing, at which those in support of - and in opposition to - the application testify briefly. The Planning Board then makes a recommendation (approve/deny w/w.o. conditions). In this case the Planning Board recommended denial based primarily on concerns about compatibility with the Sector Plan. [There was also a minority that stated concerns about health risks.]

Step three of the process involves a series of hearings, conducted by a Board of Appeals Hearing Examiner. The hearings are conducted in what is termed a "quasi-judicial" process. In essence, the Hearing Examiner functions as a fact-finder. There is no jury, but the fact-finder can ask the sorts of questions a jury might want answered and, in this case, the fact-finder asked many questions. This phase of the process is sometimes quite brief. But in this case it extended over a period of over one and one-half years and involved some 37 hearings. The number of hearings set a record for Montgomery County land use cases, involved dozens of witnesses - both 'experts' and those with more limited expertise - and generated over 600 exhibits including many thousands of pages of arguments, references, and opinions. A detailed description of the substance of these hearings is - obviously - beyond the scope of this brief synopsis, but much of the relevant material can be found at the Stop Costco Gas Coalition (SCGC) website ([www.stopcostcogas.org](http://www.stopcostcogas.org)).

At the end of the hearings, the Hearing Examiner - charged with preparing a report to 'justify' his/her recommendation - requested two extensions (because of the enormous amount of material on record) and filed a final report of over 250 pages (plus two appendices). [The Hearing Examiner's report (available on the County Website and - via a link - on the SCGC website) contains a detailed statement of what took place at the hearings, but does not include the sort of context-related observations included in this Analysis.] The recommendation was for denial, with suggested conditions (if the Board of Appeals decided to approve). The Hearing Examiner's recommendation was based primarily on his conclusions as to health risk and the extent to which the proposed gas station would be incompatible with the adjacent neighborhood. [It is obviously impossible to summarize his detailed analysis here.]

Thus at all three stages of the Special Exception evaluation process, the recommendation of the evaluating entity was to deny the application. The Board of Appeals then took the matter under consideration. There was a brief (some two-three months) delay while the Ethics Commission considered concerns of possible conflict of interest (raised by two Board members who requested evaluation of whether they should be recused). After the Ethics Commission ruled there was no reason to recuse the two board members, the Board acted quite swiftly and denied S-2863.

At this point the simple factual statement is that Costco/Westfield/Leggett were defeated and that the request to build the mega gas station as proposed has been denied. That leaves two obvious questions: What happens next? and How did what has happened happen?

**What happens next?:** Clearly, we enter here into the area of predictions and these come in several parts.

Part 1 concerns Costco. It seems safe to predict that the humbled Costco is unlikely to give up its ill-advised effort to build the gas station on the site to which citizens objected. [The objections were always about the site. The citizens do not object to a Costco gas station; they simply object to the site and, in fact, they repeatedly proposed alternative sites. And they certainly do not object to the Costco Warehouse. In fact many are happy Costco customers - although not as many as were before the gas station blood-bath played out.] Given the neanderthal notion that Costco “cannot afford” to lose this fight, unless the younger members of Costco’s leadership team (it is the younger members of any Goliath Corporation who are flexible enough to adjust to changing realities) step up to the plate, Costco appears to have two possible paths forward (if one can call it “forward”).

The first is to appeal the BoA decision in court. There are two cost factors here. The first is that, because of Montgomery County law, it is the County that must bear the legal costs of opposing any challenge made by Costco. The second is the cost to Costco. It spent millions on the S-2863 process. Is it willing to spend millions more on a legal appeal? The notion that any corporation has unlimited funds is patently silly: as they say, “a million here, a million there, and pretty soon we are talking about real money”. One of the SCGC ‘team’ repeatedly told people - including various county officials - that “Costco cannot afford to win this case, and neither can the county”. Was he right?

The second obvious option available to Costco is to wait the required amount of time (eighteen months?) and then reapply. The problems with this are clear: more cost, more delay, and uncertainty. Uncertainty as to what site to propose, uncertainty about the interpretation of recent changes in the county land use code (and perhaps an even stricter version of ZTA 12-07 counteracting apparently favorable changes in the code), uncertainty about changes in EPA regulations, uncertainty about what the opposition team would do next time (how much did they learn and how much stronger are they because of the victory none of them really expected?). Many say that businesses do not deal well with uncertainty; can Costco? They met a ‘Black Swan’ this time around (the “Black Swan Effect” is, in essence, the premise that some events are deemed impossible - until they happen). Could there be another ‘Black Swan’ out there?

A third possibility (actually a really long shot) is suggested by a careful reading of the SCGC closing argument. That argument pointed out that, had Costco proposed to construct a charging station for electric cars, they might have blunted much of the citizen opposition - at least the major one related to Health Risk - and provided a progressive service to their membership. As the Costco leadership chews on the denial and their options, might a rising star in the younger segment of the management team raise the notion that the idea of constructing a charging station could in fact be a ‘win-win’?

Part 2 of these speculative predictions relates to what Costco’s co-conspirator - Westfield Corporation - will do. Westfield is an enormous corporation and the Wheaton Mall is said to be one of their most profitable locations. But the Wheaton

location is not without its problems, crime and traffic being high on the list. Many people were already questioning whether or not to patronize the Mall. More will now avoid it, in part because of the increased traffic brought in by the Costco Warehouse. On the other hand, many are attracted precisely because of the Warehouse. What would be the effect of the proposed mega gas station? Westfield's higher-ups must ponder that question. Because, should Costco decide to forgo waging a court battle and opt to wait and re-apply for a Special Exception, Westfield must rethink how much help to proffer its co-Goliath. Will Westfield suddenly find that the alternative sites proposed by the citizens are, in fact available - and will it pressure Costco to apply for permission to use one of those sites? It is by now obvious to most (but perhaps not Westfield or Costco) that the siting of the Warehouse, especially if the gas station were to be placed in the same parking lot, is problematic. Traffic on the ring road is greater than many will tolerate. And the narrowness of that road - in conjunction with the placement of the Warehouse so close to the road - makes the situation unacceptably dangerous for pedestrians who wish to walk from the University Blvd. side to the Metro station on the Veirs Mill side of the Mall, without having to walk through the Mall arcade itself.

The entire issue of the "ped path" is one that occasioned considerable discussion during the hearings. Westfield was responsible, then Costco was responsible. Some felt that Leggett and the County Council were responsible. The only thing that was clear is that the ped path was not being built and its construction seemed unlikely. The ped path was being held hostage to the decision on S-2863 and the fine print was that the ped path would most likely not be built unless Costco got approval of S-2863. Some on the County Council recognize that the failure to build the ped path is a political albatross, but will they have the stones to change the current situation? Webmaster thinks they will, but how they will do that remains unclear.

Of course Part 3 of the predictions game concerns the third member of the bully conglomerate, Executive Leggett. What will he do? Anyone familiar with his modus operandi could have predicted that he would deny having had any 'position' on the gas station issue - and he is already doing that. But what will he do when Costco decides what IT will do? If Costco opts to pursue the matter in court, will Leggett (as many predict) instruct the County Attorney to 'tank' on defending the BoA decision? Probably not, but Leggett always has his finger to the wind and leads the County by a mix of cunning and careful use of serendipitous events. He won a third term aided by the fact that the Costco case (which many see as critical to his image as working effectively to improve the county economy) had not been decided. Hence no one could use a denial of S-2863 against him. Other facts are relevant - related to the details of politics in MoCo - but they are much too complex to be treated here (see the concluding section below).

Leggett will have to decide, if Costco opts for re-applying, how he wants to play the game. And his decision will involve the complex calculus of what he sees as his future. The aging power player is probably not interested in running for a fourth term for County Executive. At least one knowledgeable person, to whom Webmaster has spoken, predicted that Leggett, in all probability, would not even serve out the entire third term. If that is so, what will he do? A run for higher office (Governor?) seems a long shot now. Some legal post, like Attorney General? Possible. A cushy job with some corporate Goliath (like Costco)? Also possible. What is clear is that

Leggett is not likely to stake the rest of his career on the Costco gas station. A more likely scenario is that he will work behind the scenes to convince Westfield to 'find' that one of those other sites is in fact now available and then work to convince Costco that siting the gas station on that other site makes sense. Given that members of the Opposition are also rethinking alternative sites, it seems most likely that a deal will be brokered in which everyone compromises on an alternative site for the gas station. That way Leggett saves face - as do many other players. However Leggett decides to do things, it should be remembered that he is a lawyer. So he must be careful to avoid even the appearance of conflicts of interest, or failure to fulfill the oath he took after he was elected, or the legal code of conduct. He will of course be tried in the court of public opinion.

Part 4 of the predictions game involves all of the other players in this long-running soap opera. The County Council, the Board of Education, the hired hands who did such a poor job for Costco (with respect to S-2863), and of course the citizens who did what they set out to do: STOP COSTCO GAS. Once the various decisions noted above have been made, and the game resumes, all of these other players will have to make their decisions. It seems impossible to predict the elements of THAT tangled web, but a careful study of how Costco lost S-2863, may in fact serve to assign probability values to the various possible actions. Hence we turn - in the following section - to the other major question.

### **How did it happen; how did Costco lose?:**

The answer to this question is, in Webmaster's opinion, actually a two-part answer. The first is very short and almost self-evident. The second is a more nuanced analysis of why the first answer is correct. The connection between the two levels of answer is fairly obvious, but the details can only be presented in the context of a nearly blow-by-blow analysis of the three stages of the process discussed above (see the concluding section).

The simple answer: Costco lost because of hubris, sloppy work (on the part of its team), serendipity, and the hard work of a group of adult learners (the Opposition team).

The nuances: To clarify a bit, Webmaster choses to explain briefly each of the four elements in the sentence above.

1. Hubris: Costco/Westfield/Leggett made the fatal mistake, from the very outset, of assuming that they knew best and that they would not be challenged in any meaningful way. This lead them to presume that no serious objection to the gas station would be mounted. [In a sense the obvious pleasure that citizens had about the Costco Warehouse played into the Applicants' fatal flaw, because they misconstrued the position of the community. Interestingly, one member of KHCA proposed, in 2010, that the community mount a boycott of Westfield and threaten one of Costco. Of course such a boycott would have probably had almost no financial impact on either corporate Goliath (or on Leggett), but it would have sent a message that things might not go as easily as the three Goliaths presumed.]

2. Sloppy work: The flawed assumptions referred to above lead to an air of complacency on the part of the Applicants' team, a complacency they did not recover

from until much too late in the process. When the Planning Staff recommended denial the wounded Goliaths reacted like the inflexible dinosaurs they are: they howled that the staff was in error. When, shortly thereafter, the Planning Board also recommended denial, the dinosaurs were obviously stunned. But, instead of doing some homework and preparing for the critical Hearing phase, they simply marched onto the battlefield and began by telling the Hearing Examiner that the Opposition would argue from emotion whereas they (the Goliaths) would present facts to the fact finder. What was astonishing about this - in retrospect - is that the Opposition (specifically the SCGC) had already filed a series of documents (and posted them to the website) that clearly laid out the basic argument - on factual grounds - an argument to which they adhered throughout the hearings. The Goliaths clearly did not understand that being passionate about a position is not an emotional flaw, but a state of mind that sharpens the effort. As the hearings progressed, it became increasingly obvious that the Applicants' had been incredibly sloppy in preparing for the hearings and continued to be sloppy as they presented their case. A thorough reading of the transcripts, coupled with the detailed report of the Hearing Examiner will provide numerous examples.

3. Serendipity: A careful observer of the story of S-2863 will have perceived a number of instances where serendipity played into the hands of the Opposition. Of course many unexpected events were not helpful to the Opposition, but - in most such cases - they were sufficiently flexible so as to re-group from the 'bad' events and return to the battle with minimal damage. Where the Opposition really excelled however was in making adroit use of the unexpected 'good luck' instances. The number of examples of such instances is astonishing, but two will serve to illustrate the point here.

a. The hearings were originally planned to begin on March 11, 2013 and there were to be four of them. Shortly before the first hearing, the Hearing Examiner - for reasons given in his report - proposed delaying the start of the hearings by a few weeks. The Applicants' attorney seized on this opportunity to propose a longer delay and a schedule involving eight hearings rather than four. This series of events gave the Opposition more time to prepare for the hearings - both in terms of careful reading of the Applicants' filings and in terms of tactics for the hearings. The time - and knowledge - gained turned out to be vital because it allowed the Opposition to make an impressive showing in the first few hearings.

b. Although not all of the Opposition was in agreement with the strategy (following), several members decided that a crucial tactical element would be to fight the battle in an unconventional manner so that Applicant witnesses would not be able to use their standard "patter" as easily and so the Hearing Examiner would be forced to listen as the witnesses (many of whom had appeared before him many times before) struggled to respond to questions/objections posed in an unconventional way. The fact that the hearings were conducted in a "quasi-judicial" manner and the fact that the Hearing Examiner functioned as a "fact-finder" were both serendipitously beneficial to the Opposition, most of whom had no legal training. In fact, the entire SCGC team appeared "pro se" (without legal representation) and it was obvious to everyone that they were - initially at least - well outside their own comfort zone. But they had done their homework and asked many penetrating questions. The Hearing Examiner, who was scrupulously fair, allowed both sides a great deal of latitude, on the premise that he would rather hear all the facts and then

decide which were in fact relevant. Some members of the Applicant and Opposition teams felt the Hearing Examiner was being unfair to them, but the fact was that he was equally fair/unfair to both sides.

This state of affairs had positive effects for the Opposition almost from the very beginning. For example, one of the SCGC team questioned the Applicant Traffic Expert in great detail. He (the SCGC member) is a scientist and he was simply asking questions the way a scientist would ask them. He made many mistakes, but was largely unfazed - because as a scientist he was used to making mistakes and was not overly bothered by making them or having them 'exposed'. So he plowed on and - in the process - exposed some mistakes made by the Traffic Expert. To the scientist this was simply business as usual. But for the Hearing Examiner and the Traffic Expert (who was regarded as THE source of all such expertise), it was shocking. Thus, by serendipity (the scientist had never even read a TIA before the start of the hearings), this initial questioning turned out to be a very effective 'shot across the bow'.

4. Hard work: From the outset of the hearings (indeed from the start of the entire SE process) most members of the Opposition did not expect to win. In fact most expected to lose. Actually, most had no personal 'stake' in the outcome except the desire to prove that Costco could not justify its demand that its wishes be met. Put very simply, the Opposition had decided to fight the bully (that is what most Goliaths are in such situations) and were willing to work exceedingly hard. They were fighting 'the good fight' and the 'plan' was to fight it so hard that - when they lost - they could look in the mirror and say "I gave it my best shot". But what no one could have predicted was how effective that attitude would be. They were/are adult learners" and they parcelled out tasks and they went to work. Each one did his/her job. The only rewards were knowing they were doing their best and that they were learning - a lot. In contrast, the Applicants' team was simply doing its job(s) - for which it was getting paid. PERIOD. If one thinks about it, in reality the Opposition had the advantage.

**CONCLUSION:** Webmaster prepared this "report" as a relatively brief explanation of how Costco/Westfield/Leggett lost the battle of S-2863 and as his take on what is likely to come next. One thing that will come next is a full-length book. Early on in the process Webmaster began to understand that he was taking part in something nearly unique. He was part of a team of people who had taken on Goliaths and was kicking their butts around the block. So he began to take notes, for a book that would fully explain what had taken place. He even recorded the date when he made that decision: May 13, 2013. Then he wrote a provisional outline and used it to record his notes. And he wrote a Preface. At some point he sent the Preface and the Outline (which was already getting rather detailed) to several people and asked for their opinion. One wrote back that she liked the Preface but as to the book, was he planning to write "War and Peace"? She meant that as a joke of course. But the fact is that S-2863 **was** a war. Or rather it was a battle - part of a war. And - as this report indicates - Webmaster was part of a team that won that battle. But the war is not over. And until the war is over, there can be **no peace**.