

A Webmaster's Odyssey - Part 1

In an earlier article (<http://www.educationalassistance.org/SpeakingOut/SaidHere/Takelt.pdf>), I described in a rather tongue-in-cheek fashion how I became the Webmaster for the Stop Costco Gas Coalition (SCGC). Little did I know how much effort would be expended on the project, how much time would elapse before the "process" (see below) would be complete, and how much I would learn along the way. This piece is intended to be a fairly serious one (the first of several actually) that provides some perspective on the events as they unfolded. I am trying here to write as an objective observer of events in which I was (and still am) quite passionately involved. My intent is to leave all the passion on the SCGC website and, on this - "my own" website - write as though I was/am simply observing the events as they unfolded. It will be a rather neat trick if I can pull it off, but let me try and - if anyone reads this - you can decide how close I've come.

Before proceeding, it seems relevant to note that I am a retired academician (scientist/educator) and was a civic activist (with primary focus on public education) until I retired in February, 2008. In a sense, I "came out of retirement" when I agreed to become SCGC Webmaster for the duration of the "process".

The "process" of which I speak is the process by which Montgomery County (MD) evaluates and renders judgement (approved or denied) on an application that Costco filed requesting permission to build/operate one of its gas stations, specifically in the southwest quadrant of Westfield's Wheaton Mall. As I write this piece the process has been going on for over three years - or about six months, depending on how one marks the start of the process. And it is not actually nearly over, although some might argue that we are getting close. In any case, my own involvement began in October of 2012 and since it is now early March of 2013, my clock says I've been involved for about six months and my estimate is that I will be done in less than six months more, so I believe I'm at the half-way point.

When Costco applied for a Special Exception to build the proposed gas station (in November, 2012), it was actually continuing a process that began in late 2009 or early 2010: the details can be found on the SCGC website (www.stopcostcogas.org). Costco's application (actually the second one) was submitted to the Montgomery County Board of Appeals, was labelled S-2863, and entered into the formal machinery. The mechanism specifies that the application be sent to the planning commission for evaluation, initially by planning staff, and then by the Planning Board. [All of the details are specified by County Code and various regulations; these are posted to the SCGC website].

I should note at this point that serving as webmaster for the SCGC meant (to me) that I should attempt to understand the process (which I now do) and that our website should attempt to provide access (for all interested citizens) to all relevant materials. As best I can determine, our website is now the most complete source of information on this process: that "fact" does not especially please me; rather it puzzles me that a small group of citizen activists have become the most reliable and up-to-date information source on this complex and now highly controversial process.

Our website is , of course, a place where we have placed all of our concerns about and arguments against Costco's application. But we have also posted every filing that Costco has made (so far as we know), as well as all materials (or links to them), about the relevant law (County Code), regulations, hearings, media coverage, etc. There is also information about the role that the Kensington Heights Civic Association (KHCA) played (and continues to play) in opposing Costco's gas station. KHCA lead the opposition long before SCGC was formed; they are the only opposition group that has hired a lawyer to represent them in the legal process.

When SCGC filed its numerous position papers with the staff of the planning commission (in mid-January, 2013), we included an overview of the process in several of those filings because they were intended to be posted to our website and to engage as many citizens as possible in the process. I quote here one such overview (rather long), not because I regard it as "deathless prose" but because it reflects how I view the process and why I am writing this article (or series of articles).

"The process by which S-2863 is being decided is a quasi-judicial and sociopolitical 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.

(...We are..) 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, the Board of Appeals will issue a summary decision and, after that, one or more appeals may 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.

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 about 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 are tired of the battle, despite the fact that 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."

Since that section was written, planning staff has sent a recommendation, to the Planning Board, that the Planning Board recommend denial of S-2863, on the basis of concerns about risks to public health (the SCGC website provides a link to the staff report). On February 28 the Planning Board, after a lengthy public hearing, recommended denial of the application on the grounds that it did not conform with the Wheaton Sector Plan; there was a minority voting to also recommend denial based on health risks.

Which brings us to the current situation. The matter is to be the subject of a series of hearings before the Hearing Examiner (HE). The HE is one of a number of such examiners who function within OZAH - the Office of Zoning and Administrative Hearings. OZAH is part of the Board of Appeals (BoA) and the findings of the HE will be sent to the BoA as a recommendation. It is the BoA that will make the "final" decision on S-2863. [I say "final" because the process allows for appeals to the decision of the BoA and, given the intensity of this battle, it is reasonable to presume that whichever side "loses" will file an appeal. At that point, SCGC will no longer be involved because we are not represented by a Counsel of Record and therefore cannot take part in any appeals - at least that is my current understanding of this matter.]

When S-2863 was filed in late November of 2012, the HE scheduled four hearings on the matter: March 11, 15, 18, and 22. KHCA has filed several requests for continuance (we are not sure as to how many), based on the assertion that Costco filed its various documents so close to the operational deadlines as to be prejudicial to the ability of opponents to read and respond to Costco's filings. SCGC filed one such request for continuance. All such requests were rejected.

Over the weekend of March 2-3, the HE contacted Costco, KHCA, and SCGC expressing concerns that the amount of material before him was such that it did not appear to him that proceeding with the hearings within the March time frame was realistic. [The exact basis of the HE's concern is not entirely clear and various people have expressed different opinions as to what actually happened and why. As a member of the SCGC I have my own opinions, but choose NOT to express them here because I want to provide an "objective" overview.] He proposed a series of hearing dates beginning in late March (22) and extending into April. SCGC replied that we were agreeable to his proposal (we actually were prepared to start on March 11). KHCA also agreed to the proposal of the HE. Costco replied that the amount of new material was so extensive that they felt a total of eight hearings would be required and that these should not start until late April. After a series of phone conferences, the HE ruled that the hearings would be eight in number, commencing on April 26 and extending through May and into early June

In the aftermath of the HE's ruling, there were many "complaints" that this change in the hearing dates was "unfair". As an objective observer, my response to such

comments is that "fairness" is in the eye of the beholder and is NOT the issue here. The HE must make his decisions according to the rules of the stated process. His assessment of "fairness" must be more nuanced than that of a lay person. He must make his decision so as to display appropriate attention to "due process". In cases such as S-2863, the applicant (Costco) must meet "the burden of proof" as to a number of elements of the Code. The opposition must only show that Costco has NOT met the burden of proof. While I am not a lawyer, I believe I understand how the HE has arrived at the conclusion that due process requires that he delay the hearings for two reasons: he must give Costco time to refine its arguments, given the recent recommendations (denial) of the planning staff and the Planning Board. Further, he must give himself time to review all filings so that he can render the "correct" recommendation and report it to the BoA in a manner that convinces them they should support his recommendation.

A number of members have complained (to me) that there is nothing new at this point. Costco's filings were made in December and SCGC filings were made (to planning staff) in January and have been posted to our website since then. But that is not the point. SCGC filings were made to planning staff, not to the HE/OZAH/BoA. We made our filings to the HE on February 28, one day before the stipulated deadline. That is the way this process works; we knew that and we followed the rules. That one may presume everyone could have read our filings many weeks before the February 28 submission date is NOT the issue. The rules are clear and Costco has, by the rules, been presented with new filings. [In fact, SCGC filed three additional documents with the HE that were not filed with planning staff; all were very short, but they were new.]

As this is being written (March 8, 2013), members of the SCGC are of course disappointed that the HE hearings have been delayed - for many reasons. But SCGC members are ready today, and will be ready in April, to argue convincingly that Costco has not met the burden of proof and that S-2863 should be denied. It is to be expected that Costco will submit numerous additional documents and that Costco's opponents will have to prepare responses within a very short time frame. But that is what the process stipulates.

MRA, 8 March 2013