

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY

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:
PETITION OF COSTCO WHOLESALE : Case No. S-2863
CORPORATION : OZAH No. 13-12
:
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A hearing in the above-entitled matter was held on July 30, 2013, commencing at 9:40 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, 2nd Floor Council Hearing Room, Rockville, Maryland 20850
before:

Martin L. Grossman
Hearing Examiner

A P P E A R A N C E S

For the Applicant:

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C O N T E N T S

Witnesses: Direct Cross Redirect Recross

David A. Sullivan
By Mr. Silverman 44
By Ms. Rosenfeld 86

Thomas J. Flynn
By Ms. Harris 166

E X H I B I T S

Exhibit No. Marked/Received

209	April 16, 2013, memorandum	51
210	Montgomery County, Maryland, DFMS Fuel Sites	66
211	EPA School-Siting Guidelines	71
212	Excerpt from EPA 40 CFR Part 51	88
213	2009-2012 NO2 values from nearby monitors	118
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P R O C E E D I N G S

1 MR. GROSSMAN: This is the ninth day of a public
2 hearing in the matter of Costco Wholesale Corporation, Board
3 of Appeals No. S-2863, OZAH No. 13-12, petition for a
4 special exception pursuant to Zoning Ordinance 59-G-2.06 to
5 allow petitioner to construct and operate an automobile
6 filling station which would include 16 pumps. The subject
7 site is located at 11160 Veirs Mill Road, Silver Spring,
8 Maryland. That's Lot N, 631 Wheaton Plaza, Parcel 10, also
9 known as Westfield Wheaton Mall, and is zoned C-2, general
10 commercial.
11

12 The hearing was begun on April 26, 2013, resumed
13 on May 1, May 6, May 23, June 4, June 17, June 19, and July
14 8, 2013. The July 11 session was canceled due to the
15 illness of KHCA's counsel. It was noticed to resume again
16 today. The next session has been noticed for tomorrow, July
17 31, in the seventh floor council hearing room in this
18 building, Council Office Building, at 9:30 a.m.

19 This hearing is conducted on behalf of the Board
20 of Appeals. My name is Martin Grossman. I'm the Hearing
21 Examiner, which means I will take evidence and write a
22 report and recommendation to the Board of Appeals which will
23 make the decision in this case. Will the parties identify
24 themselves, please, for the record?

25 MR. SILVERMAN: Larry Silverman --

1 MR. GROSSMAN: Mr. Silverman.
2 MR. SILVERMAN: -- Costco Coalition.
3 MS. CORDRY: Karen Cordry for KHCA.
4 MS. ROSENFELD: Michele Rosenfeld, KHCA.
5 MR. ADELMAN: Good morning, Mr. Grossman.
6 Dr. Mark Adelman for the Coalition.
7 MR. GROSSMAN: Good morning.
8 MR. GOECKE: Good morning. Michael Goecke on
9 behalf of Costco.
10 MR. GROSSMAN: Mr. Goecke.
11 MS. HARRIS: Good morning. Pat Harris, Lerch,
12 Early & Brewer, on behalf of Costco.
13 MR. BRANN: And Erich Brann for Costco.
14 MR. GROSSMAN: Mr. Brann. Okay. Let me see if
15 there are a few preliminary matters here. First of all, is
16 there anybody in the audience -- I see Mr. Charman in the
17 audience -- is there anybody else in the audience who wishes
18 to be heard? And I also see Ms. Duckett and -- yes, you
19 want to announce your names, too, so we get them on the
20 record in case you participate?
21 MS. DUCKETT: Eleanor Duckett, Kensington View
22 Civic Association.
23 MS. SAVAGE: Donna Savage, KHCA.
24 MR. CHARMAN: Clifford Charman on behalf of
25 himself.

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1 MS. CHARMAN: Barbara Charman.
2 MR. GROSSMAN: All right.
3 MS. ADELMAN: Abigail Adelman, Stop Costco Gas
4 Coalition.
5 MR. GROSSMAN: All right. And that includes
6 everybody who's in the audience and all familiar faces now
7 to us. So I will dispense with asking if there's anybody
8 else who wishes to be heard today. Of course, tomorrow's
9 session, which will be held in the council hearing room on
10 the seventh floor, we have set aside the morning for anybody
11 who wishes to come in and be heard. Of course, anybody has
12 a right to do that at any of these public sessions, but I
13 was asked by a number of citizens if we could do that for
14 their convenience. So we have set that aside for them. I
15 don't know how many people we'll have. Does anybody have an
16 idea about that?
17 Nobody has any feedback. Well, it might not be a
18 bad idea, Ms. Harris, to have a backup witness available
19 just in case there is not a lot of public oral input.
20 There's been --
21 MS. HARRIS: Okay.
22 MR. GROSSMAN: -- obviously a lot of written input
23 here. Okay.
24 MR. ADELMAN: Could Ms. Harris specify who she
25 expects to call if we do have a backup witness?

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1 MR. GROSSMAN: Certainly.
2 MS. HARRIS: I think that's going to depend on --
3 well, as I indicated to Ms. Rosenfeld, our next witness
4 after Mr. Silverman is Tom Flynn. Now, having said that, we
5 had initially informed Mr. Flynn that he wouldn't be needed
6 tomorrow because we expect that it will likely take the
7 whole day. So I need to check in with him to make sure that
8 he could be available.
9 MR. GROSSMAN: Okay. All right.
10 MS. ADELMAN: Mr. Grossman, may I?
11 MR. GROSSMAN: Yes.
12 MS. ADELMAN: I was under the impression the next
13 witness was Dr. Chase.
14 MS. HARRIS: Originally our plan had been for
15 Mr. Chase to follow Mr. Silverman, but nothing in this
16 hearing has gone according to plan, and Mr., Dr. Chase is
17 out of town on other business. So he's not even available.
18 MR. GROSSMAN: Okay.
19 MR. ADELMAN: Is it appropriate to ask who would
20 be your fallback if Mr. Flynn can't --
21 MS. HARRIS: I don't know. I can probably tell
22 you at a break. I need to check in on --
23 MR. ADELMAN: Okay, fine. Fine.
24 MS. HARRIS: -- in terms of people's availability
25 and also Mr. Flynn's availability.

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1 MR. GROSSMAN: Okay.
2 MS. HARRIS: Before the end of the day, I'll be
3 able to give you a sense of that.
4 MR. ADELMAN: Okay, thank you.
5 MR. GROSSMAN: That would be great. I mean, maybe
6 it's possible that we'll have people occupying all day
7 tomorrow from the public or, you know, maybe not. So it's a
8 good idea to have since we don't want to waste the session.
9 All right. Let me mention a few things. On July
10 5, 2013, a supplemental needs analysis was filed by the
11 applicant, assuming that the general neighborhood is defined
12 as technical staff did so in its report. That was at my
13 invitation. The new analysis is Exhibit 198. Also, since
14 the last hearing on July 8, various e-mails were exchanged
15 and copied to the hearing participants and made part of the
16 public record. These e-mails and filings are included in
17 Exhibits 199 through 208. The significant ones are Exhibits
18 200, 202, 203, and 205.
19 Exhibit 200, received on July 10, 2013, is an
20 e-mail exchange from -- between Pat Harris and
21 Maryland-National Capital Park and Planning Commission,
22 asking, at the Hearing Examiner's suggestion, that
23 representatives from KHCA, Stop Costco Gas Coalition,
24 Kensington View, and Costco meet collectively with technical
25 staff in an effort to identify a mutually agreeable solution

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1 to the pedestrian path issue. Staff also sent the parties
2 copies of the latest site and landscape plans with issues
3 that need to be addressed prior to staff's final comments.
4 Those are included in Exhibits 200(a),(b),(c), and (d).
5 Exhibit 202, received July 11, 2013, e-mail from
6 Donna Savage with questions regarding procedures for the
7 July 31st hearing in regard to public comments and my
8 responses to those questions.
9 Exhibit 203, received July 11, 2013, is an e-mail
10 from me to the parties, indicating that technical staff does
11 not wish to meet collectively with the parties in an effort
12 to identify a mutually agreeable solution to the pedestrian
13 path issue; rather, staff will supplement its position
14 regarding the pedestrian path after receiving applicant's
15 response to its July 10 comments. I don't know if there has
16 been any additional response. Mr. Goecke or Ms. Harris, has
17 there been any additional response to the questions raised
18 by technical staff about, on their plans that they submitted
19 in Exhibit 200? They raised questions as they -- they
20 submitted copies of their plans with questions imprinted on
21 them. I believe they were communicated to --
22 MS. HARRIS: Yes. We met with technical staff and
23 have clarified --
24 MR. GROSSMAN: Okay.
25 MS. HARRIS: -- what they were looking for, and

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1 our intent is to finalize the plans and resubmit them.
2 MR. GROSSMAN: Okay. Well, when would that take
3 place?
4 MS. HARRIS: Well, one of, as you may recall, one
5 of the issues had to do with the pedestrian path, and
6 they're --
7 MR. GROSSMAN: Right.
8 MS. HARRIS: -- all on one plan; so we're working
9 through that with Westfield. So I would hope within the
10 next two weeks we will be submitting finalized revised
11 plans, the --
12 MR. GROSSMAN: And I take it that the only issues
13 that are going to be finalized here are the pedestrian path
14 issue along the southern ring road --
15 MS. HARRIS: Correct.
16 MR. GROSSMAN: -- I presume the wall is the way it
17 will be but you may clarify its construction, whatever, as
18 they asked, and the changes to the addition of the bollards
19 and the movement of the underground tanks and the refueling
20 area. Is that --
21 MS. HARRIS: And then one additional thing, and it
22 was an issue raised by staff, in terms of supplemental
23 plantings within the buffer area.
24 MR. GROSSMAN: Right. Right. So those are the --
25 those are areas that have already been discussed here. I

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1 just want to make sure there are no surprises coming down
2 the road.
3 MS. HARRIS: No surprises.
4 MR. GROSSMAN: Okay. All right. And, of course,
5 nothing stops the parties, even though technical staff was
6 reluctant to meet as a group with all the parties, nothing
7 stops the parties from -- I can't be a mediator here,
8 obviously -- but nothing stops the parties from talking to
9 each other and seeing if they have some agreeable solution
10 to the pedestrian path issue. So I leave that open to you.
11 It's not, obviously not required, but it would be a good
12 idea.
13 Okay. Exhibit 205, I sent notice on July 18,
14 2013, to everybody in the world -- that's a slight
15 exaggeration but fairly well describes this case -- with the
16 agreement of the parties, scheduling additional hearing
17 dates for September 9, September 16, September 20, September
18 23, October 17, October 21, October 24, and October 28. We
19 fervently hope that not all of them will be needed, but I
20 was importune to do that just in case.
21 All right. I also mentioned at the July 8 hearing
22 that, in going over the testimony, I noticed that
23 Mr. Hurlocker testified that the underground tanks would
24 hold 90,000 gallons of fuel but the engineering report,
25 Exhibit 13, indicates 60,000 gallons, and you indicated,

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1 Ms. Harris, you would check out that issue. Your
2 inclination was to believe that it was 90,000, but have you
3 had an opportunity to check that out?
4 MS. HARRIS: Yes, and it is, and my apologies, I
5 thought I had done that. Yes, it is.
6 MR. GROSSMAN: And it is what?
7 MS. HARRIS: Ninety thousand.
8 MR. GROSSMAN: Okay.
9 MR. ADELMAN: So that means the engineering report
10 is inaccurate?
11 MR. GROSSMAN: Well, to that extent, I guess.
12 MR. BRANN: That the engineering report
13 incorrectly stated 60,000 gallons, that's correct.
14 MR. GROSSMAN: All right. That was Mr. Brann
15 volunteering that.
16 MS. ROSENFELD: I'm sorry, Mr. Grossman. What did
17 Mr. Brann volunteer?
18 MR. GROSSMAN: Mr. Brann volunteered that the
19 engineering report's statement that the underground tanks
20 would each hold 60,000 gallons was incorrect, that the
21 correct figure is what Mr. Hurlocker testified to a number
22 of weeks ago, that it was 90,000 gallons per underground
23 tank.
24 MS. CORDRY: I don't believe, actually -- is that
25 correct? I thought it was 90,000 total or --

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1 MR. ADELMAN: Yeah.
2 MS. CORDRY: -- 60,000 total.
3 MR. GROSSMAN: Oh. Well, you --
4 MS. HARRIS: It's --
5 MS. ROSENFELD: It's 30,000.
6 MR. BRANN: It's 90,000 gallons total --
7 MR. GROSSMAN: Oh, okay.
8 MR. BRANN: -- 30,000 gallons of premium fuel and
9 60,000 gallons of regular unleaded fuel.
10 MR. GROSSMAN: Okay.
11 MR. ADELMAN: And that doesn't include the special
12 tank that holds --
13 MR. BRANN: The additive --
14 MR. ADELMAN: -- additive?
15 MR. BRANN: -- the additive tank is a 1500-gallon
16 tank, and we're not yet approved through the State of
17 Maryland to add the additive to the gasoline. We're working
18 on that process now.
19 MS. CORDRY: And I guess just, perhaps we can just
20 clarify here rather than have anybody come back: Are the
21 tanks as shown in the designs and the sizes and everything,
22 are those actually the correct size to hold the 30,000
23 gallons of diesel, sir?
24 MR. BRANN: Yes. Yeah, they're correctly shown on
25 the plans. That was a, that was a typo in the engineering

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1 report.
2 MS. CORDRY: Okay, thank you.
3 MR. GROSSMAN: All right. So just so we're clear,
4 Mr. Brann, you're still under oath --
5 MR. BRANN: Correct.
6 MR. GROSSMAN: -- and those statements you made
7 now are under oath.
8 MR. BRANN: Well, I hope so.
9 MR. GROSSMAN: All right. And those statements,
10 if I understand correctly, there are two major tanks: a
11 60,000-gallon regular tank and a 30,000-gallon premium tank,
12 and the third one is the additive?
13 MR. BRANN: There's actually four underground
14 tanks.
15 MR. GROSSMAN: Okay.
16 MR. BRANN: So we'll start from the top. There's
17 four. There's two 30,000-gallon tanks that contain regular
18 unleaded, one 30,000-gallon tank that contains premium fuel,
19 and a 1500-gallon tank that would contain a detergent
20 additive when allowed by the State of Maryland.
21 MR. GROSSMAN: All right. I did misunderstand
22 that then. All right.
23 MR. ADELMAN: And one last clarification. The
24 numbers were in the part of the engineering packet that
25 Mr. Duke presented, is that correct, as opposed to the

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1 ancillary reports?
2 MR. BRANN: Correct.
3 MR. GROSSMAN: All right. So we have two
4 30,000-gallon tanks of regular unleaded?
5 MR. BRANN: Right.
6 MR. GROSSMAN: One 60,000-gallon tank of premium?
7 MS. CORDRY: No. One --
8 MR. BRANN: One 30, 30,000-gallon tank, premium.
9 MR. GROSSMAN: Oh, that's -- well, am I mishearing
10 it or are you misstating it? Maybe I'm mishearing it.
11 MR. BRANN: There's three tanks.
12 MR. GROSSMAN: Right.
13 MR. BRANN: Each -- well, there's four underground
14 tanks. Three of them are 30,000 gallons each. So there's
15 three 30,000-gallon tanks and one 1,500-gallon tank, a total
16 of 90,000 gallons of fuel --
17 MR. GROSSMAN: All right.
18 MR. BRANN: -- and 1,500 gallons of additive.
19 MR. GROSSMAN: All right. So we have two 30,000,
20 unleaded; one 30,000, premium; and then the 1,500-gallon
21 additive tank?
22 MR. BRANN: Additive, correct.
23 MR. GROSSMAN: Okay. It perhaps wouldn't be a bad
24 idea if you had a writing, and since you have a writing in
25 the file that says the incorrect 60,000 total --

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1 MS. HARRIS: Okay.
2 MR. GROSSMAN: -- that you submit a writing that
3 has those figures on it. I mean, the record now is clear as
4 to what it is but that might not be a bad idea.
5 All right. Also, Mr. Sullivan indicated -- and
6 welcome back, Mr. Sullivan.
7 MR. SULLIVAN: Good morning.
8 MR. GROSSMAN: At the July 8 session that he was
9 going to supply us with a clarified version of Exhibit
10 189(b), which addresses his, your various air pollution
11 models. That was the hearing of July 8, Transcript 51 to
12 54. There were some clarifications that were discussed at
13 the hearing and also resulted in Mr. Silverman saying he
14 wanted another shot at additional cross-examination which I
15 said was appropriate. Do we have that clarification of that
16 exhibit?
17 MR. GOECKE: I don't think we do. 189(b)? We
18 haven't provided that yet?
19 MR. GROSSMAN: Not that I've seen. Has anybody
20 else gotten such a clarification?
21 MR. ADELMAN: No.
22 MR. GROSSMAN: Does everybody agree with my
23 recollection there?
24 MR. ADELMAN: Yes.
25 MS. ROSENFELD: Yes.

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1 MR. GOECKE: And I'm sorry. Could you explain
2 that again, Mr. Grossman, exactly what it's supposed to be?
3 MR. GROSSMAN: There were a series of -- it was
4 the way things were labeled on the exhibit --
5 MR. GOECKE: Yes.
6 MR. GROSSMAN: -- that were somewhat confusing,
7 and Mr. Sullivan indicated that he would submit something
8 that clarified the labeling and would serve as, in effect, a
9 new Exhibit 189(b), maybe prime 2 or whatever.
10 MR. GOECKE: Right.
11 MR. SULLIVAN: Mr. Grossman, was that Section 1 of
12 that report, the two or three tables, because that was --
13 that was resubmitted.
14 MR. GOECKE: I thought we did resubmit that.
15 MS. HARRIS: My recollection was that --
16 MR. GROSSMAN: Okay.
17 MS. HARRIS: -- that came in before the last
18 hearing.
19 MR. SULLIVAN: That's my recollection too.
20 MR. GROSSMAN: No, but I know. There was a, there
21 was a discussion of the resubmission as -- all right. Let's
22 turn to the July 8 hearing, which is the last one we had,
23 and pages 51 to 54, my notes say here -- well, for example,
24 what I said on page 51:
25 Mr. Grossman: Hold on one second. I do want you

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1 to also, when you do your 189(b) double i, to put units in
2 there. If it's micrograms per cubic meter, it should say it
3 on the chart somewhere. I don't see it on the chart.
4 And there were other, other clarification issues
5 regarding that chart. You can look over the transcript --
6 MS. HARRIS: Okay.
7 MR. GOECKE: Okay.
8 MR. GROSSMAN: -- so that we make sure we're, we
9 have a clear exhibit there.
10 MR. GOECKE: Okay. I apologize. I do not have
11 that.
12 MR. GROSSMAN: Okay. And then I have one other
13 question for the parties. I took a look at some of the
14 noise regulations in our interregnum, and I have a question
15 as to -- I mean, some of the implication of questions that
16 were asked on cross-examination is whether or not noise must
17 be measured at the property line, and I'm not sure from the
18 regulations that it says it has to be at the property line.
19 It can be at the property line or beyond, as I understood
20 them, but I do want to clarify what is the standard that
21 you're asserting and, also, the question of whether or not
22 the appropriate measurement is incremental noise or overall
23 noise. Under the regs does one subtract out the background
24 noise in measuring the permitted noise?
25 So those are just questions that occurred to me in

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1 looking at the, not just the statute, but the regs that
2 govern how the statute is to be applied regarding noise
3 control. So I will leave that to you to look at and submit
4 whatever you need to submit to clarify that for the next --
5 well, tomorrow is the next hearing. You may not have time
6 to do it by then. So --
7 All right. Are there any other preliminary
8 matters from -- we'll start out with the opposition, which
9 is now, I assume, the left side of the table as of the last
10 time. Anybody?
11 MR. ADELMAN: Yes.
12 MS. ROSENFELD: Yes, Mr. Grossman.
13 MR. GROSSMAN: All right. Ms. Harris, do you have
14 any preliminary -- I'm sorry. Yes, Doctor.
15 MS. ROSENFELD: Michele Rosenfeld.
16 MR. GROSSMAN: Yes.
17 MS. ROSENFELD: I would like to thank the Hearing
18 Examiner and Ms. Harris and Mr. Goecke and Mr. Brann, all
19 three, for their consideration in allowing for a delay in
20 the proceedings.
21 MR. GROSSMAN: Well, we could do no less and --
22 MS. ROSENFELD: I was not well. I'm doing much,
23 much better.
24 MR. GROSSMAN: Good, yes.
25 MS. ROSENFELD: My doctor read me the riot act,

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1 and I thank you for your consideration.
2 MR. GROSSMAN: You're looking well, and we're all
3 pleased about that. Yes, Dr. Adelman.
4 MR. ADELMAN: Can you hear me?
5 MR. GROSSMAN: I can.
6 MR. ADELMAN: A miracle. We have, the Coalition
7 has three brief procedural questions.
8 MR. GROSSMAN: Okay.
9 MR. ADELMAN: The first is that Ms. Harris has not
10 provided us with the numbers for the contractually specified
11 parking spaces for Costco patrons. We discussed that at the
12 last hearing. I believe I know the numbers, but I'd prefer
13 to use factually accurate numbers, and if you could provide
14 those, you know, in the next few days, that would be very
15 helpful.
16 MR. GROSSMAN: Ms. Harris.
17 MS. HARRIS: I'm not clear on the relevancy of
18 that.
19 MR. GROSSMAN: Well, can you supply it? I guess
20 that's the first question.
21 MS. HARRIS: There's no contractual requirement
22 for the parking. I mean --
23 MR. GROSSMAN: Okay.
24 MS. HARRIS: -- the parking for the entire
25 shopping center is determined, but there's no contractual

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1 provision in the lease.
2 MR. GROSSMAN: Okay.
3 MR. ADELMAN: It was -- it's my understanding that
4 Costco is allocated a certain number of spaces, that it's
5 not a free-for-all. If I'm incorrect, I stand corrected.
6 MR. GROSSMAN: Mr. Brann.
7 MR. BRANN: That's incorrect. We do not have a
8 contractual agreement with Westfield for a certain number of
9 parking spaces.
10 MR. GROSSMAN: Is there an allocation of some kind
11 that is lingering in the background here or -- as opposed to
12 a contractual obligation?
13 MR. BRANN: The only contractual obligation would
14 be, on the lease there is what is known as a preferred area,
15 which is an area that we maintain, but it is not a
16 contractual number of parking spaces, by any means.
17 MR. GROSSMAN: Okay.
18 MR. ADELMAN: Not to be argumentative, but there
19 has been discussion at this table about specific numbers of
20 spaces that are -- perhaps allocated contractually is
21 incorrect -- assigned to Costco, for example, assigned to
22 Target, and so forth. And I believe --
23 MR. GROSSMAN: All right. Anticipated, maybe
24 anticipated to be used by those as opposed to assigned?
25 MR. ADELMAN: Well, I believe it's stronger than

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1 that. Again --
2 MR. GROSSMAN: Okay.
3 MR. ADELMAN: -- I might be corrected, but I
4 believe it's stronger than that because, in principle, each
5 store or whatever you call it, each business that surrounds
6 that parking lot has the expectation that there will be some
7 parking spaces available for its patrons.
8 MR. GROSSMAN: All right. Do we have an answer to
9 that, Mr. Brann?
10 MR. BRANN: As I said, we have what's known on the
11 lease as -- lease exhibit -- as a preferred area, which we
12 have the right to object to Westfield coming in and building
13 something in that area, but we don't have, there is no
14 contractual agreement between us. I don't know about
15 Target. I don't know what their deal consists of. I know
16 they probably have the same scope, where they have a
17 preferred area that is what they consider to be their
18 parking, but they don't have a specified number of parking
19 spaces either. It is --
20 MR. GROSSMAN: Okay. So --
21 MR. BRANN: -- required in our lease that the mall
22 park legally per the jurisdictional code. Other than that,
23 there's no requirement for a certain number of parking
24 spaces.
25 MR. GROSSMAN: And that preferred area, I take it,

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1 that's an area of the parking lot; is that what you mean?
2 MR. BRANN: Correct.
3 MR. GROSSMAN: Okay.
4 MR. BRANN: That is correct.
5 MR. GROSSMAN: And that preferred area can hold a
6 certain number of parking spaces, I take it, by your
7 calculation, of --
8 MR. BRANN: By just design or calculation, it
9 could, correct.
10 MR. GROSSMAN: Has that been calculated by Costco?
11 MR. BRANN: I mean, we can tell you how many
12 parking spaces are in our preferred area but that's not a
13 contractual agreement for us, but we can provide that.
14 MR. GROSSMAN: No. Okay. But I think that was
15 the, I think that's the essence of the question. How
16 many --
17 MR. ADELMAN: Yes.
18 MR. GROSSMAN: -- parking spaces are in your
19 preferred area?
20 MR. BRANN: I'll have to get the exact number.
21 Off --
22 MR. GROSSMAN: Okay.
23 MR. BRANN: -- the top of my head, I don't
24 remember exactly.
25 MR. GROSSMAN: Okay.

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1 MR. ADELMAN: Thank you. That would be very
2 helpful. I should have used the term preferred area. And,
3 again, I'm referring to the parking lot and the parking
4 garage.
5 MR. BRANN: Correct.
6 MR. ADELMAN: Okay, fine.
7 MR. GROSSMAN: Okay.
8 MR. ADELMAN: Okay. Second question,
9 Mr. Grossman --
10 MR. GROSSMAN: Yes, sir.
11 MR. ADELMAN: -- I've been assiduously trying to
12 read the rules of procedure for both the Board of Appeals
13 and for OZAH, and the question is --
14 MR. GROSSMAN: We've been planning to revise OZAH
15 for a long time now. So --
16 MR. ADELMAN: But I have to --
17 MR. GROSSMAN: -- don't hold us too much to those.
18 MR. ADELMAN: -- I have to abide by the rules.
19 MR. GROSSMAN: And as soon as we started another
20 project to do that recently, we realized that since the
21 zoning ordinance is being rewritten, it doesn't make sense
22 to reissue our rules until they, until the Council decides
23 on the new zoning ordinance. So we put that on the back
24 burner for now, but go ahead --
25 MR. ADELMAN: All right. The question --

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1 MR. GROSSMAN: -- with that preamble.
2 MS. ADELMAN: -- the question, in essence, goes to
3 the definition of an expert witness, but more importantly,
4 you've mentioned that, several or at least once that I can
5 recall, that you give certain amount of weight to testimony,
6 and I would --
7 MR. GROSSMAN: Right.
8 MR. ADELMAN: -- I'd like a clarification as to,
9 quote, the value of testifying as an expert witness or the
10 witness with expertise given that you place weight on the
11 testimony of anyone in line with what you perceive to be the
12 value, quotation marks, of the testimony proffered. Am I
13 correct about that?
14 MR. GROSSMAN: Well, I guess. The -- what I think
15 I said is, first of all, expert witness is somebody who can
16 offer testimony that is perhaps beyond the ken of a layman
17 in a particular area and will be of assistance to the fact
18 finder. An expert doesn't have to be somebody of a
19 particular educational background and so on. That's the way
20 expert is generally considered in the law.
21 Yes, every, I think every fact finder has to make
22 an allocation of how much weight to give testimony of
23 various witnesses. If, when you hear the qualifications of
24 somebody, you think they are less qualified in a particular
25 area, that would go to the weight of what you think about

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1 their testimony. The same is true of laywitnesses. If you
2 think that their opportunity to observe something is, you
3 know, not as good as some other people who may have observed
4 it, you might give more weight to the ones who had a better
5 opportunity to observe something, and so on.
6 So it's just a -- that's the way fact finders
7 always operate. You have to weigh testimony based on the
8 acuity of the witness, their opportunity to observe, their
9 background, if they're offering testimony that involves
10 knowledge about some area. So all of those things go to
11 weight. It's a common function of fact finders, and it's
12 not just, not just in administrative proceedings but in
13 courts, in court proceedings as well.
14 MR. ADELMAN: Okay, thank you. And then --
15 MR. GROSSMAN: Does that help?
16 MR. ADELMAN: Yes, thank you. And then just one
17 last question. Just out of curiosity -- this is on the most
18 recent exhibit list, or actually, it's been there for a
19 while -- Exhibit 110 is listed as an exhibit excluded. That
20 was, I believe, the histogram that Mr. Guckert proffered and
21 to which we objected, but we didn't object to it in terms of
22 content. We were objecting just that we hadn't received it
23 in a timely fashion, and I was wondering why it was
24 excluded.
25 MR. GROSSMAN: I don't remember off the top of my

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1 head; so let me look at the exhibit list for a second. Now
2 I have to look at the exhibit. Hold on a second.
3 Dr. Adelman, you're straining my brain too early in the
4 morning here.
5 MR. ADELMAN: I apologize, sir.
6 MR. GROSSMAN: Well, I don't see it in the file,
7 which may mean that, because it was excluded, it wasn't
8 included, although usually I will include them, such
9 exhibits, in the file --
10 MR. ADELMAN: As I recall --
11 MR. GROSSMAN: -- and with a mark, with a --
12 MR. ADELMAN: As I recall, Mr. Grossman, it was a
13 folded sheet, a rather complicated --
14 MR. GROSSMAN: Oh.
15 MR. ADELMAN: -- histogram, and they were
16 collected at the table, which --
17 MR. GROSSMAN: Oh, that may be --
18 MR. ADELMAN: -- at the time, we assumed meant --
19 MR. GROSSMAN: Right.
20 MR. ADELMAN: -- they were going to be sent to us
21 electronically, and I was just asking, why was it excluded
22 as opposed to being sent --
23 MR. GROSSMAN: I'd have to look back, I don't
24 recall --
25 MR. ADELMAN: Fine, thank you.

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1 MR. GROSSMAN: -- I'd have to look back at the
2 transcript to have a shot at answering that.
3 MR. ADELMAN: Thank you very much. No further
4 questions.
5 MR. GROSSMAN: Okay. Any other preliminary
6 matters? Ms. Harris.
7 MS. HARRIS: Three, briefly. One is, at the very
8 beginning of Mr. Sullivan's testimony, he had requested
9 copies of the videotape, full copies of the videotape, and I
10 don't believe we ever heard back whether that, they could
11 accommodate that request.
12 MR. GROSSMAN: I'm sorry.
13 MS. HARRIS: Mr. --
14 MR. GROSSMAN: Oh, you're talking about from --
15 MS. HARRIS: From --
16 MR. GOECKE: Blue Lagoon.
17 MS. HARRIS: -- Blue Lagoon.
18 MR. GROSSMAN: Blue Lagoon. And we were waiting
19 to hear back from Blue Lagoon because your son, I guess, was
20 here, sir.
21 MR. ECHAVE: Yes, he was. What was their request
22 again?
23 MR. GROSSMAN: The request was that Mr. Sullivan
24 wanted to see a complete copy of his testimony, whatever you
25 filmed of him. I know you weren't here actually during part

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1 of, of that.
2 MR. ECHAVE: Right. Well, I'm not here,
3 videotaping for the County.
4 MR. GROSSMAN: Yes.
5 MR. ECHAVE: So I don't, you know, I don't see any
6 reason why I should provide a copy of what's going on until
7 the documentary is edited. I'll be glad to give them a copy
8 of the edited documentary.
9 MS. HARRIS: And that is precisely our concern and
10 Mr. Sullivan's concern --
11 MR. GROSSMAN: Right.
12 MS. HARRIS: -- that he wants to make sure that he
13 has an unedited copy of his testimony so that there's a
14 record of what occurred, because there's concern about the
15 editing.
16 MR. GROSSMAN: Is there any reason not to do that,
17 sir?
18 MR. ECHAVE: Well, I mean, I don't, you know, I
19 don't have legal representation here that I can answer you,
20 but basically, I'm a member of the press. I believe that
21 this would be like giving a reporter's notes.
22 MR. GROSSMAN: Well, no, I don't know that it's --
23 it's not quite the same because, when a person is taking
24 notes, they're putting their own personal input in it.
25 You're having an actual filming of what goes on. Perhaps I

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1 could ask you that by the next session you would respond to
2 that request. I'm not directing anything. There's nothing
3 in the Board of Appeals rules that specifies a response to
4 this particular request. The Board's rules say that unless
5 it's going to be disruptive, that such filming should be
6 permitted, and you certainly haven't been disruptive; so I
7 would certainly permit the filming. Whether or not, as a
8 matter of fairness, you should make available a full copy is
9 another question, and it may be beyond my authority to act
10 on it. I haven't really considered the question because
11 it's just been raised, but Ms. Harris, do you have a point
12 to make?

13 MS. HARRIS: No. My other point/preliminary
14 matter was I have another item at the Council that I need to
15 run to because it's coming up right this moment.

16 MR. GROSSMAN: Okay.

17 MS. HARRIS: So Mr. Goecke is going to take over,
18 but I'll be back in hopefully 20 minutes.

19 MR. GROSSMAN: All right, Ms. Harris.

20 MS. HARRIS: Sorry.

21 MR. GROSSMAN: That's G-954? Is that what you --

22 MS. HARRIS: Excuse me?

23 MR. GROSSMAN: G-954?

24 MS. HARRIS: Yes.

25 MR. GROSSMAN: Okay.

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1 MR. ECHAVE: So --

2 MR. GROSSMAN: So what I'd ask is that for our
3 next session, if you would, or you could make it -- let's
4 give you a couple more days. By the August 2 session, which
5 is on Friday, if you could respond to that request by
6 Mr. Sullivan that he have a complete unedited copy of his
7 testimony that you've -- to the extent that you've recorded
8 it, all right?

9 MR. ECHAVE: So that's going to -- just to let you
10 know, I'm not going to do it. I'm going to have to find a
11 lawyer to answer that because there are lawyers in the room
12 and I find it, frankly, a little off-putting that I'm here,
13 recording an event that is a public event --

14 MR. GROSSMAN: Yes.

15 MR. ECHAVE: -- and I don't -- I'm being asked to
16 provide, as I said, it's considered, whether you agree with
17 it or not, it's considered a reporter's notebook, for me to
18 give you a copy.

19 MR. GROSSMAN: Well, I'm not asking you to give me
20 anything.

21 MR. ECHAVE: No, I know. I know. So, you know --

22 MR. GROSSMAN: Yes. I don't --

23 MR. ECHAVE: And secondly, I would just add, since
24 the lady who --

25 MR. GROSSMAN: Ms. Harris?

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1 MR. ECHAVE: Ms. Harris, intimated that
2 Mr. Sullivan is concerned about the edit --

3 MR. GROSSMAN: Yes.

4 MR. ECHAVE: -- well, you know, you can say that
5 about everything that goes on television and radio every
6 day. Everything is edited except C-SPAN.

7 MR. GROSSMAN: I understand. I'm not asking you
8 to argue the point --

9 MR. ECHAVE: I mean, they can sue me after the
10 documentary gets out to say, well, he may have
11 misrepresented because he didn't use the whole sentence. Go
12 ahead.

13 MR. GROSSMAN: Right, but we're not, at this
14 point, we're not, we're not asking you to respond now. I'm
15 going to give you time to respond, but that's a request --

16 MR. ECHAVE: Yeah. I just want you to know that
17 my response is going to have to entail me going to a lawyer
18 and spending money to be able to answer you, because it's
19 not going to be valid to respond to a man like you or these
20 people sitting at the table, you know. I'm going to have to
21 get a lawyer to answer that.

22 MR. GROSSMAN: Well, all right, obviously you have
23 the right to do --

24 MR. ECHAVE: Yeah.

25 MR. GROSSMAN: -- whatever you want about that.

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1 All I'm saying is, the question has been asked by counsel --

2 MR. ECHAVE: Right.

3 MR. GROSSMAN: -- and I'm asking you for a
4 response to that question. You can get a lawyer or not get
5 a lawyer, whatever you wish to do, and I'm not making,
6 putting any requirements on you, just asking you to respond
7 to the question which has been posed by counsel.

8 MR. ECHAVE: Understood.

9 MR. GROSSMAN: Okay.

10 MR. SILVERMAN: Clarify, Mr. Grossman --

11 MR. GROSSMAN: Yes, sir.

12 MR. SILVERMAN: -- Mr. Goecke had been apparently
13 not saying that they have a right to this.

14 MR. GROSSMAN: Well, we're not going to debate the
15 issue now. Right now it's just a request. I don't know
16 whether they have -- I haven't had an occasion to research
17 that. It's not really --

18 MR. SILVERMAN: Yes, but they haven't, they
19 haven't asserted that, have they?

20 MR. GROSSMAN: Mr. Goecke?

21 MR. BRANN: We merely asked for a copy.

22 MR. GOECKE: We're just asking for a copy.

23 MR. SILVERMAN: Yes. Then it's just a courteous
24 request.

25 MR. GROSSMAN: Right.

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1 MR. GOECKE: Correct.
2 MR. GROSSMAN: At this point, it's a courtesy
3 copy.
4 MR. SILVERMAN: A courtesy copy and --
5 MR. GROSSMAN: Right.
6 MR. SILVERMAN: -- Mr. Echave can courteously say
7 yes or courteously say no.
8 MR. GROSSMAN: That's up to him.
9 MR. SILVERMAN: Okay.
10 MS. CORDRY: And all of that --
11 MR. GROSSMAN: But we do, we do want it to be
12 courteous, yes.
13 MR. SILVERMAN: Okay, thank you.
14 MS. CORDRY: And all of that will courteously --
15 MR. GOECKE: Looks like he found his lawyer.
16 MS. CORDRY: And all of that will courteously
17 accompany the fact there is a court reporter taking down
18 every word here. So in terms of what was said, there is no
19 question that everything is recorded here.
20 MR. GROSSMAN: That's true. I mean, that's a good
21 point to -- for Mr. Sullivan, to consider the fact that
22 there is a verbatim transcript being made. So there really
23 isn't a possibility of editing in a way that you won't know
24 that something differs from what's been said, because there
25 is a verbatim court reporter's transcript made. So just --

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1 MR. SULLIVAN: That is a good point, but as an
2 expert witness, my concern was I don't want videographic
3 evidence being taken out of context and then being played at
4 trial 10 years from now.
5 MR. GROSSMAN: Well --
6 MR. SULLIVAN: So I'd like to have the copy in my
7 files to be able to provide the full record in case that did
8 occur.
9 MR. GROSSMAN: Okay. I understand. Everybody has
10 legitimate concerns, and Blue Lagoon will address them at
11 the August 2 proceedings.
12 MR. GOECKE: Thank you.
13 MR. GROSSMAN: Okay.
14 MR. GOECKE: And we have two more preliminary
15 points, if I may, quickly.
16 MR. GROSSMAN: Yes, sir.
17 MR. GOECKE: So while Mr. Flynn, as Ms. Harris
18 said, will be our next witness after Mr. Sullivan, he's not
19 nearby and he has some other engagements today. So if we
20 could have like a two-hour notice when the opposition thinks
21 they may be able to wrap up, we can make sure that Mr. Flynn
22 is here.
23 MR. GROSSMAN: Well, when you say wrap up, you're
24 talking about --
25 MR. GOECKE: That when they anticipate concluding

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1 examining Mr. Sullivan --
2 MR. GROSSMAN: Okay.
3 MR. GOECKE: -- just so --
4 MR. GROSSMAN: All right. To the extent that you
5 can give an estimate about that. Usually you can double
6 these estimates of attorneys, but --
7 MR. GOECKE: Right.
8 MR. GROSSMAN: Okay.
9 MR. GOECKE: Right. And then, finally, at the
10 last hearing, I believe, it came up about whether or not
11 Mr. Sullivan would go out and take new noise samples at the
12 site, and he has done that. We haven't been able to prepare
13 the report in time for this hearing, but I just wanted to
14 give everyone notice that there will be another supplemental
15 report regarding noise coming.
16 MS. CORDRY: Ah, okay.
17 MR. GROSSMAN: Well --
18 MS. CORDRY: This will never end.
19 MR. GROSSMAN: Let me ask you this question. When
20 would the cross-examination take place regarding these new
21 pieces of evidence?
22 MR. GOECKE: Well, the direct examination hasn't
23 taken place. So it would be after the direct examination,
24 and to the extent that it doesn't happen -- I mean, it all
25 depends when we finish with Mr. Sullivan and what the

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1 remaining witnesses, how long they would take to present our
2 case. If -- because August 2nd is the last hearing date we
3 have in August, we've got several weeks there before -- the
4 next witness for Costco would present in September. So it
5 could be on the first date in September.
6 MR. GROSSMAN: So what you're thinking about is
7 calling back Mr. Sullivan for additional direct examination
8 regarding new measurements?
9 MR. GOECKE: We could either do it that way. If
10 you prefer that we save it for our rebuttal case, we can do
11 it that way as well. We're flexible.
12 MR. GROSSMAN: Well --
13 MS. ROSENFELD: No, the case-in-chief.
14 MR. SILVERMAN: You can't save it for the rebuttal
15 case.
16 MS. ROSENFELD: No. It would have --
17 Mr. Grossman, I would --
18 MR. GROSSMAN: Yes.
19 MS. ROSENFELD: -- ask that it be as part of the
20 case-in-chief.
21 MR. GROSSMAN: Okay.
22 MR. GOECKE: That's fine.
23 MR. GROSSMAN: I think that's reasonable, and I'm
24 not sure that it would be correct to say rebuttal. You
25 don't even know what the defense witnesses are going to say;

1 so I don't know that you can say it's a rebuttal.
 2 MR. GOECKE: That's fair.
 3 MR. GROSSMAN: All right. So you're anticipating
 4 recalling Mr. Sullivan at a future time to put on additional
 5 noise evidence?
 6 MR. GOECKE: Correct.
 7 MR. GROSSMAN: Now, where we left off, I believe
 8 Ms. Rosenfeld had completed her cross-examination and
 9 Mr. Sullivan had said he had some additional questions he
 10 wanted to ask. I suppose that it wouldn't make any sense, I
 11 don't know if you had any -- Mr. Silverman, did you have any
 12 noise cross-examination that you were going to be doing?
 13 MR. SILVERMAN: I did not on --
 14 MR. GROSSMAN: Okay.
 15 MR. SILVERMAN: -- on the -- voluminous materials
 16 have been submitted, but I don't know --
 17 MR. GROSSMAN: I'm just saying that if there's
 18 going to be more noise evidence, maybe it would make sense
 19 to hold off any cross-examination on --
 20 MR. SILVERMAN: Well, I don't have any, and I hope
 21 there's not --
 22 MR. GROSSMAN: Right.
 23 MR. SILVERMAN: -- more noise evidence. I mean,
 24 at some point, you know, just, it's just dollars against
 25 people. It just goes on and on. I mean, he had plenty --

1 there's been lots of opportunity. This had been discussed
 2 for three years and he could have -- every time we find a
 3 weakness in their case, then we can have a new estimation,
 4 have new models and new parameters? At some point, they
 5 will win because they'll exhaust our resources and that's
 6 really what's happening.
 7 MR. GROSSMAN: I don't think anybody would ever
 8 exhaust the opposition's resources in this case. I think
 9 that you -- yes.
 10 MS. CORDRY: I will say, my leave bank at work
 11 used to be to a point where I was at use or lose and I was
 12 losing many hours a year. It has now diminished greatly. I
 13 am spending my work time coming to this hearing every day.
 14 I come every day, and I find every time I get here that I'm
 15 going to have to take more. I could easily run out of leave
 16 and have to start going on unpaid leave before this hearing
 17 is over at the rate we are going, Your Honor. So -- and
 18 that doesn't count the amount of time and money we've spent
 19 outside of the hearings. It does not count the amount of
 20 time and resources our community has had to put up in order
 21 to hire Ms. Rosenfeld.
 22 I mean, we are not joking here, Your Honor. We're
 23 not -- this is not an amusing matter, and I know you're not
 24 joking, but this is a matter of absolute clarity and
 25 prejudice to this group that it is absolutely true that

1 every time we raise an issue they come back, they do another
 2 report, they do another report, they do another report.
 3 These issues have been on the table since day one. These
 4 reports should have been done properly to begin with, and
 5 the fact that every time we come back they can come up with
 6 another report that somehow solves all the problems, they
 7 can exhaust us, Your Honor. And at some point, this is
 8 prejudicial, it is unfair, and it is not the way a community
 9 should have to deal with this issue.
 10 MR. SILVERMAN: You know, if in our case-in-chief
 11 we present things that they never discussed or investigated,
 12 well, you know, it would be fair to call them back, but this
 13 is -- all, all that the applicants are responding to is
 14 cross-examination, and everything in the cross-examination
 15 was within the scope of the direct examination and within
 16 the scope of the reports.
 17 MR. GROSSMAN: All right. Do you want to respond
 18 to that, Mr. Goecke?
 19 MR. GOECKE: Yes, a few things. I think to the
 20 extent that they're concerned about delay, I think when you
 21 look on balance, the amount of time we've spent examining
 22 our witnesses and the cross-examination, the
 23 cross-examination in length has been about a two-to-one
 24 ratio, if not longer. And so in terms of who's dragging out
 25 this proceeding, I take exception to that accusation.

1 To the extent that this is some type of war of
 2 attrition, where we're trying to wear them out, this has
 3 been very expensive for Costco, as well, and Costco wants to
 4 finish this proceeding as quickly as anybody else does. So
 5 it's not our intention to drag this out longer than it need
 6 be. And these, these are facts. All we're trying to do is
 7 merely submit more facts. And they are attacking aspects of
 8 the evidence we've submitted to date, and so we're
 9 presenting new facts to address some of those questions, but
 10 it's as if they want their concerns to be the final word and
 11 not to have the facts get in the way of their theories about
 12 what's wrong with the evidence there in the first place.
 13 And in terms of noise specifically, there's just absolutely,
 14 we believe, no basis here that the noise from a gas station
 15 is going to constitute any type of a nuisance, but to the
 16 extent that they have concerns about some of the ways in
 17 which the data was collected or the duration of the data,
 18 the timing of the data, we've gone out and taken more
 19 samples at times that we think will address all of the
 20 issues that they've raised on cross-examination --
 21 MR. GROSSMAN: All right.
 22 MR. GOECKE: -- and we think it's important to get
 23 these facts into the record.
 24 MR. GROSSMAN: I think there are legitimate
 25 concerns on both sides here. There's a legitimate concern

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1 by the community that they are faced with additional
2 evidence repeatedly. There's a legitimate concern on the
3 part of Costco that they want to make sure that the evidence
4 they submit factually represents the situation. So I think
5 there's a balancing here that has to be done.
6 I guess what I would say in response to your
7 suggestion that there'll be more evidence regarding noise
8 measurements is that I'll act on the request to submit
9 additional evidence when it's submitted and when I hear any
10 objection that may be made to it. Since you've already made
11 the additional measurements, that won't require any
12 additional effort on your part, and then if there's, if this
13 objection is raised to this additional evidence, then I'll
14 act on the objection at that point. All right.
15 MS. ROSENFELD: And, Mr. Grossman, I'd just like
16 to respond briefly to the point that was raised about the
17 opposition taking two-to-one amount of time.
18 MR. GROSSMAN: Right.
19 MS. ROSENFELD: I assume Mr. Goecke is correct in
20 his representation. The materials that had been provided
21 are expert materials. They are voluminous documents with a
22 lot of detailed factual information. We're largely a group
23 of laypeople here, working through these expert reports, and
24 it takes time to bring out the factual points that we are
25 trying to make in this case. It certainly is not any kind

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1 of deliberate attempt to make these proceedings last any
2 longer than absolutely necessary, I can assure you --
3 MR. GROSSMAN: I understand. I --
4 MS. ROSENFELD: -- from our side of the table.
5 MR. GROSSMAN: -- I don't think he was accusing
6 you of trying to drag your feet. I think he was saying that
7 if you compared the amount of time on cross-exam with
8 direct, it was longer on cross. I understand. There's been
9 a remarkably thorough job done by both sides here; so, yes,
10 it's taken a lot of time, which is regrettable from all
11 perspectives, including my own, I suppose. So, you know, to
12 the extent we can move along quickly, that will be great,
13 and we don't want to use up, certainly, any more community
14 resources or Costco's resources than is necessary to get a
15 review of this case. So why don't we just proceed now. Any
16 other preliminary matters?
17 MR. GOECKE: No.
18 MR. GROSSMAN: All right. Once again, where we
19 left off was Mr. Silverman's opportunity to have additional
20 cross-examination based on the clarifications that were
21 presented or additional information presented by
22 Mr. Sullivan. Mr. Silverman, you have the floor.
23 MR. SILVERMAN: Thank you, sir.
24 MR. GROSSMAN: Mr. Sullivan, you are still under
25 oath.

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1 (Witness was previously sworn.)
2 THE WITNESS: Understood.
3 MR. SILVERMAN: Thank you.
4 CROSS-EXAMINATION (Resumed)
5 BY MR. SILVERMAN:
6 Q Nice to see you. I just have a few questions --
7 MR. GROSSMAN: Yes.
8 BY MR. SILVERMAN:
9 Q -- on attainment and non-attainment. Am I correct
10 in understanding that it's the administrator of the EPA who
11 decides whether a region is in attainment with the national
12 air quality standards or not?
13 A It's an EPA decision. The air office makes that
14 decision. I mean --
15 Q Okay.
16 A -- ultimately their boss is the administrator.
17 Q Okay. And that's after a long formal process,
18 opportunity for comment and so forth?
19 A There's a formal process for that designation.
20 Q And right now the current designation on PM 2.5 is
21 that this region is in non-attainment, is that correct?
22 A That is correct.
23 Q And I understand that the Council of Governments
24 is seeking to change that designation, is that right?
25 A That's my understanding. It's likely to change,

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1 correct.
2 Q Well, excuse me, sir. You have -- I'd like to
3 move to strike the answer unless you have some, some
4 reliable direct evidence to that effect.
5 MR. GROSSMAN: All right. Do you have any
6 reliable direct evidence to that effect --
7 THE WITNESS: I have the evidence --
8 MR. GROSSMAN: -- that it's likely to drive?
9 THE WITNESS: Well, I can present to you that the
10 trend line for PM 2.5 -- let me finish, please -- is quite a
11 ways below the standard. And so I know it's being reviewed
12 at this point in time, that based upon that trend line, it
13 would seem likely it'll be changed to attainment.
14 BY MR. SILVERMAN:
15 Q This is your prediction about what EPA will do?
16 A That's my opinion of what EPA will do based upon
17 the current trend and current levels of PM 2.5 in the
18 metropolitan region.
19 Q You know, I didn't, I just want to know if you --
20 you have, you are speculating as to what EPA will do now.
21 Now, has COG even put in an application, Council of
22 Governments being the designee for governors, has COG even
23 put in an application for a designation, or the designation
24 of non-attainment for the new 12 micrograms per cubic meter
25 standard? Have they even put in an application for that?

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1 A I don't know the answer to that, Mr. Silverman,
2 but my understanding is that it's likely to be
3 re-designated.
4 Q You don't know the answer. Your counsel submitted
5 a document that asked them to change the designation on the
6 old standard and that there's nothing in that that discusses
7 the new standard, isn't that correct?
8 A I don't, without seeing a -- and I don't really
9 know the document you're --
10 Q You've seen the document, I assume.
11 A I'm not sure what you're referring to. My point
12 that I'm making is that my understanding is that the area is
13 going to be reconsidered for attainment/non-attainment.
14 Based upon the trend line, my expectation is -- this is my
15 opinion -- is that it's lower than the standard, it'll
16 likely to be changed, but I don't have any more information
17 than that.
18 Q The document was the one you submitted. It's
19 called Washington D.C., Maryland, Virginia 1997 PM 2.5
20 Maintenance Plan.
21 MR. GOECKE: Objection. I submitted that
22 document. Mr. Sullivan did not submit that document.
23 MR. GROSSMAN: All right. What --
24 BY MR. SILVERMAN:
25 Q So did you not see that document, sir?

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1 MR. GROSSMAN: Well, hold on one second.
2 MR. SILVERMAN: Sorry.
3 MR. GROSSMAN: Let's just identify it by exhibit
4 number first. I think that'll be helpful. I did see that
5 submission, and I think it was part of Exhibit 189, but do
6 you happen to recall the exhibit number, either
7 Mr. Silverman or --
8 MR. SILVERMAN: I have it, but --
9 MR. GOECKE: I believe it's 193, Mr. Grossman.
10 MR. GROSSMAN: 193? Okay. Let's see. Yes.
11 Well, it's June 28, '13, COG Study of Air Quality
12 Maintenance Plan. Is that what we're talking about?
13 MR. SILVERMAN: That's the one.
14 MR. GROSSMAN: Okay. So it's Exhibit 193.
15 BY MR. SILVERMAN:
16 Q And isn't it a fact that this is an effort by the
17 regional governments to change the designation of
18 noncompliance with the 15 micrograms per cubic meter
19 standard?
20 A I believe that is correct, and I looked at that
21 report --
22 Q Thank you.
23 MR. GROSSMAN: Well, no, let him finish his
24 answer, Mr. Silverman.
25 MR. SILVERMAN: Okay.

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1 THE WITNESS: I looked at that report in terms of
2 the trends, and I did focus less in terms of the
3 administrative matters.
4 BY MR. SILVERMAN:
5 Q Well, by administrative action, you mean the
6 official decisions?
7 A Any decisions relative to changing attainment
8 status.
9 Q All right. So there's really, there's really no
10 discussion in that document of the new standard, is that
11 correct?
12 A I don't recall it being in there.
13 Q And, also, when the new standard came out, it
14 just, didn't just come out as a standard. Weren't there
15 some new metering or monitoring requirements for the new
16 standard?
17 A Well, when the PM 2.5 standard came out --
18 Q Yes.
19 A -- they certainly required different monitors.
20 Q Different monitors?
21 A Correct.
22 Q And did they not require some near-road
23 monitoring?
24 A It required various scales of monitoring to be
25 done.

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1 Q And specifically, was it not a requirement for
2 near-road monitoring?
3 A I believe there was.
4 MR. GOECKE: Mr. Grossman, I believe this document
5 speaks for itself, and Mr. Sullivan hasn't even testified
6 about this document.
7 MR. GROSSMAN: You're right, the document speaks
8 for itself, but I think it's fair cross-examination for him
9 to test his knowledge in this area. He's testified as an
10 expert, including regarding what the requirements are in
11 this area, what background is considered, and so on, and I
12 think it's a fair area for him to inquire of the expert.
13 MR. SILVERMAN: Also, I --
14 MR. GROSSMAN: So I'll overrule the objection.
15 MR. GOECKE: Thank you.
16 MR. GROSSMAN: You don't have to go any further in
17 responding. I overruled.
18 MR. SILVERMAN: Okay, thank you. All right.
19 MR. GROSSMAN: If he doesn't know, he can say he
20 doesn't know.
21 BY MR. SILVERMAN:
22 Q Do you know, are you aware that Gina McCarthy --
23 now the administrator of EPA, was then the assistant
24 administrator -- on April 16th, 2013, submitted a memo with
25 regard to the new 2.5 PM standard? Are you aware of that?

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1 A I have not seen that memo.
2 Q I did provide it to your counsel. Did he not
3 provide it to you?
4 A I don't remember seeing that memo.
5 Q Can I show it to you?
6 MR. GROSSMAN: Is that an exhibit?
7 MR. SILVERMAN: Yes, I guess so. I suppose so,
8 yes. I really --
9 MR. GROSSMAN: What exhibit number is it?
10 MR. SILVERMAN: No, it's not, it has not been -- I
11 don't know that it has to be an exhibit. I just --
12 MR. GROSSMAN: Oh, okay. Well, let's, if you're
13 going to --
14 MR. SILVERMAN: I provided it to Ms. Harris and
15 Mr. Goecke.
16 MR. GROSSMAN: Okay. So let's mark it as an
17 exhibit so we know what's being shown.
18 MR. SILVERMAN: Right. Right.
19 MR. GOECKE: Mr. Silverman, is this the link that
20 you sent us that you're referring to?
21 MR. SILVERMAN: Yes. Yes.
22 MR. GROSSMAN: All right. So we're talking about
23 a 34-page document, and we'll call it Exhibit 209. And
24 Exhibit 209 is April 16, 2013, memorandum from Gina
25 McCarthy, assistant administrator of the EPA, regarding --

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1 and it's to regional administrators of Regions 1 through
2 10 -- regarding Initial Area Designations for the 2012
3 Revised Primary Annual Fine Particle National Ambient Air
4 Quality Standard.
5 (Exhibit No. 209 was marked
6 for identification.)
7 MR. SILVERMAN: Sorry about that.
8 MR. GROSSMAN: Yes. Okay. Don't forget to leave
9 this with us when I --
10 MR. SILVERMAN: I definitely will not forget.
11 Okay. Now, that's Exhibit No.?
12 MR. GROSSMAN: Exhibit No. 209.
13 BY MR. SILVERMAN:
14 Q Well, I want to show you Exhibit No. 209, and I
15 want to show you page 4, and I would like you to read the
16 first paragraph. You can read it aloud, sir.
17 A I haven't read this document. So I could read
18 aloud what you'd like, but I -- but in order to interpret
19 this, I --
20 Q Well, take your time, but you know, I --
21 MR. GROSSMAN: I'm not going to have him read a
22 34-page document while he's sitting up there.
23 MR. SILVERMAN: No.
24 BY MR. SILVERMAN:
25 Q Just try, just try the first four pages, if you'd

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1 do that.
2 MR. GROSSMAN: No. What is it that you want to
3 ask him about specifically?
4 MR. SILVERMAN: About monitoring systems and
5 the --
6 BY MR. SILVERMAN:
7 Q If you would read the -- as you read the section
8 aloud, I think it speaks for itself.
9 A In --
10 MR. GROSSMAN: All right. Which section is this?
11 MR. SILVERMAN: This is page 4, first paragraph,
12 one paragraph.
13 MR. GROSSMAN: All right. All right.
14 THE WITNESS: All right.
15 MR. GROSSMAN: Page 4, first paragraph.
16 THE WITNESS: In the final rule for the revised
17 primary annual PM 2.5 standard, the EPA also finalized
18 changes to the ambient air monitoring, reporting, and
19 network design requirements applicable to the PM NAAQS,
20 including the addition of a near-road component in the PM
21 2.5 monitoring network. Because the EPA is requiring
22 placement of the first phase of near-road monitors by
23 January 1st, 2015, we do not anticipate having sufficient
24 data available from any of the newly-required monitors in
25 time for consideration in the initial designations for the

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1 2012 annual PM 2.5 NAAQS in 2014. The EPA believes that
2 given the form of the NAAQS, it is necessary to have three
3 complete calendar years of quality-assured, certified air
4 quality monitoring data from a PM 2.5 monitor for that
5 monitor to be used for compliance purposes and in particular
6 for designation purposes. The EPA does not expect to have a
7 complete set of PM 2.5 air quality data from these new
8 monitors until 2018.
9 BY MR. SILVERMAN:
10 Q Thank you. Is there anything in there that you
11 don't understand?
12 A No.
13 Q Is there anything you disagree with?
14 A I don't -- no, but again, I do take exception from
15 pulling a section of a document I haven't read and for me to
16 give you an overall view.
17 Q Well, Mr. Sullivan, don't you, don't you keep up
18 with developments in the monitoring field?
19 A I certainly do, but I can't claim to have read
20 every -- every document EPA's put out.
21 Q And didn't the 2012 change to the PM 2.5 rule
22 reference a change in monitoring requirements?
23 A Well, as you can see there, they're having
24 closer-to-the-road, major roadway, monitors that will come
25 out in the future.

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1 Q Yes, but that's a major development in your field,
2 isn't it?
3 A It's a major future development. It's not in
4 present --
5 Q Right, future development. And don't you
6 understand from what you just read that we really won't know
7 what the actual numbers are for some time?
8 A Well, that's, that's true.
9 MR. GROSSMAN: The actual -- what actual numbers?
10 MR. SILVERMAN: The actual numbers for PM 2.5, the
11 regional, regional levels.
12 MR. GROSSMAN: Well, what do you mean by region?
13 You mean the background levels? What do you mean by
14 regional levels?
15 MR. SILVERMAN: Maybe I can draw this out through
16 some questions. I could answer you directly, if you'd like.
17 The EPA's got to determine for a region-wide basis whether
18 that region -- in this case, the region is the Washington
19 metropolitan area --
20 MR. GROSSMAN: Right.
21 MR. SILVERMAN: -- whether that region is in
22 compliance or noncompliance, attainment or non-attainment
23 with air quality standards --
24 MR. GROSSMAN: Right.
25 MR. SILVERMAN: -- and when there's not

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1 attainment, there are very severe consequences. And all
2 governments, all state and local governments seek to be in
3 attainment because there's funding and other consequences,
4 which are very serious, of being in non-attainment.
5 BY MR. SILVERMAN:
6 Q Do you agree with what I'm saying?
7 A I do.
8 Q Okay.
9 MR. SILVERMAN: So they set up a group of regional
10 monitors to determine whether the region as a whole is in
11 attainment or non-attainment, and in fact, and some of
12 those -- Mr. Sullivan relies on a portion of that regional
13 system in his, in his calculations and his modeling.
14 BY MR. SILVERMAN:
15 Q Is that correct, sir?
16 A That is correct.
17 Q Okay.
18 MR. SILVERMAN: So the question is, he relies on
19 it, others rely on it, is it reliable? Does it truly
20 reflect the conditions and the latest science so that we
21 know whether the level of particulates is, of fine
22 particulates, is above 12, as Mr. Sullivan calculated at one
23 point in the history of this case, or whether it's below 12
24 micrograms per cubic meter.
25 So these measurements are very important, and what

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1 this document says is that maybe the way we're measuring is
2 not always the best way and we need to change the monitoring
3 system. That's, that's what I'm -- okay?
4 MR. GROSSMAN: Okay. I'll certainly let you
5 continue along this line. I'm just wondering, is there a
6 suggestion as to how I would factor that in in terms of this
7 case?
8 MR. SILVERMAN: Yes. Yes, sir.
9 MR. GROSSMAN: And what is, what is the
10 suggestion?
11 MR. SILVERMAN: One of the critical questions --
12 and our expert, if we get to him, will testify to it -- one
13 of the critical questions is whether or not, what the
14 background levels are. What do you start with? You go to
15 the doctor. The first thing he says is what drugs are you
16 taking before he prescribes any new drugs. So the question
17 here is, what are we breathing before any new, new
18 increments are added to the mix?
19 MR. GROSSMAN: So are you challenging the
20 suggestion, if I recall, the testimony that the background
21 is 10.8 --
22 MR. SILVERMAN: Yes, I'm challenging, yes. We
23 are, yes.
24 MR. GROSSMAN: -- micrograms per cubic meter?
25 MR. SILVERMAN: We are challenging that.

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1 MR. GROSSMAN: For fine particulates?
2 MR. SILVERMAN: Yes.
3 MR. GROSSMAN: Okay.
4 MR. SILVERMAN: That's what we're challenging.
5 MR. GROSSMAN: All right.
6 MR. SILVERMAN: And I think so is EPA.
7 BY MR. SILVERMAN:
8 Q Now, let me, since the 2012 standard came out,
9 since this memorandum from Administrator McCarthy came out,
10 do you know whether COG has changed any of its, any of its
11 monitoring stations?
12 A I know of no changes to it.
13 Q Do you know if any of its monitoring stations
14 comply with the near-road standards that are being discussed
15 in this memo and in the 2012 document?
16 A Well, you're referring to a new requirement. So
17 the answer would likely be no.
18 Q All right.
19 MR. GROSSMAN: Was there a new requirement that's
20 in place now or one that's proposed?
21 MR. SILVERMAN: No, it's -- no. This is in place.
22 When they changed the rule in 2012, they changed the
23 standard, they said we need better monitoring, we need to
24 put your monitors near roads, because governments don't like
25 to be told by the federal government how they spend their

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1 highway money --
2 MR. GROSSMAN: Right.
3 MR. SILVERMAN: -- so they want to, they tend to
4 put monitors, like the Beltsville monitor, you know, in the
5 middle of a --
6 MR. GROSSMAN: No, I don't. Let's not assume.
7 MR. SILVERMAN: Yes. Okay.
8 MR. GROSSMAN: You're going beyond my question --
9 MR. SILVERMAN: Okay. Sorry, sir.
10 MR. GROSSMAN: -- and offering evidence without
11 being under oath.
12 MR. SILVERMAN: I won't. Yes, I'm sorry.
13 MR. GROSSMAN: Okay. So I don't know what's the
14 case in Beltsville, but --
15 MR. SILVERMAN: Yes.
16 MR. GROSSMAN: So let's, let's stick to that
17 question.
18 MR. SILVERMAN: Yes.
19 MR. GROSSMAN: My question was, is this new
20 requirement for different monitors already in place? That
21 was my question.
22 MR. SILVERMAN: It is already in place --
23 MR. GROSSMAN: Okay.
24 MR. SILVERMAN: -- but the monitors are not in
25 place.

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1 MR. GROSSMAN: Okay. And you say the monitors are
2 not in place based on what evidence?
3 MR. SILVERMAN: That -- well, he just, he just
4 answered the question. They haven't --
5 MR. GROSSMAN: I don't know. Did you answer that?
6 Do you know if the new monitors are in place?
7 THE WITNESS: My understanding is they are not.
8 MR. GROSSMAN: Okay.
9 MR. SILVERMAN: That's it.
10 MR. GROSSMAN: Okay.
11 BY MR. SILVERMAN:
12 Q All right. Now with regard to the finding of
13 attainment/non-attainment, do I -- do you agree that this
14 region is in attainment for carbon monoxide?
15 A It is.
16 Q But yet you testified that on Georgia Avenue and
17 University and Veirs Mill, that the standard is being
18 exceeded routinely, did you not?
19 A I don't recall making that statement.
20 Q Did you not say that there was, there was
21 40,000 -- measurements of 40,000? Didn't you project that
22 in your investigation that you've testified about?
23 A The modeling that I -- that you're referring to
24 was done based upon rural EPA modeling techniques and that's
25 based upon a very small surface roughness, which is EPA

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1 policy, but that would tend to overpredict for an area like
2 Georgia Avenue and --
3 Q Well --
4 A Let me finish, please. And I'm following EPA
5 protocol, I'm doing what they say, but the way the AERMOD
6 model works, you know, we're putting in, for the rural,
7 we're putting in what the surface roughness is at the
8 airport, two-and-a-half centimeters, and we know it's a lot
9 higher on Georgia Avenue. So my, my -- the accurate
10 statement is that that modeling done is a conservative
11 overstatement. If you put a CO monitor next to Georgia
12 Avenue, would I expect to see an exceedance? The answer is
13 no, I would not.
14 Q Well, but your modeling predicted an exceedance.
15 A EPA modeling practice, which I followed, using
16 very conservative modeling procedures for that area, showed
17 values that are upper bound, and yes, they were
18 approximately 40,000 right next to the roadway itself.
19 Q So it may be that the, that whatever the regional
20 level is, whether the region is in attainment or
21 non-attainment, there may be hot spots where it's not in
22 attainment. Would you agree with that?
23 A Well, I don't, I don't agree with that in terms of
24 the statement you're making about Georgia Avenue, as an
25 example. And just to clarify, when you're bringing up the

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1 point about near road and why we don't have monitors, we
2 modeled near road. We modeled Georgia Avenue. We modeled
3 University and Veirs Mill. And so if you placed a monitor
4 there and added that on to what we already modeled, you'd be
5 double-counting.
6 Q I don't think that answers any question I asked.
7 My question is, is whether the regional monitors reflect
8 every part of the region; if the regional monitors say a
9 level is x, y, z, whether every part of that region is going
10 to be below x, y, z.
11 A Well, you're asking a question: If you have a
12 monitor at Rockville and Beltsville and Arlington, do those
13 represent the entire metropolitan area's background? Could
14 there be some variation within there? Well, sure, there can
15 be --
16 Q Thank you.
17 A -- but the issue is, the way the air quality world
18 works is, you need to define regional background values, and
19 then when you conduct modeling, you model those nearby
20 sources and account for those localized effects, and that's
21 what we've done here.
22 Q And you did that and you said that under your
23 modeling 40,000 is the number that your models produced for
24 Georgia Avenue, the high-traffic areas, Georgia and Veirs
25 Mill and so on.

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1 A Well, I showed the plots, but I've explained,
2 putting that in context, Mr. Silverman.
3 Q And that's --
4 MR. GROSSMAN: Mr. Silverman, you used the term
5 40,000. Let's get a unit attached to that.
6 MR. SILVERMAN: Well, I have to ask Mr. Sullivan
7 to give me the unit.
8 THE WITNESS: Micrograms per cubic meter.
9 BY MR. SILVERMAN:
10 Q Thank you. Is that an annual, or that's an hour,
11 one-hour standard.
12 A One-hour.
13 Q Thank you, appreciate that. So the fact that --
14 even assuming that the existing monitoring system is an
15 accurate one, which we have reason to question, even
16 assuming it is, it doesn't necessarily prove what the levels
17 are for the Wheaton Mall?
18 A Well, I just want to clarify the context of your
19 question. I don't accept the premise that the current
20 monitoring network is insufficient for the objectives of
21 this project. For near-road applications near 395 or the
22 Beltway or very heavily traveled roadways where those
23 monitors likely will go, that's a whole different situation
24 than this Wheaton gas station. So I don't want to blur
25 those two together.

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1 Q So near road, a monitor along Veirs Mill Road not
2 be a near-road monitor?
3 A Well, EPA will make the determination of where
4 they'll go or the state will, but if you're going to place
5 three or four near-road monitors in the city to get an idea
6 of impacts from major roadways, you'd tend to -- I would
7 tend to put them near major highways, major roads. Georgia
8 Avenue certainly is a major roadway, but there's larger
9 ones, larger volumes in the metropolitan area. They would
10 likely go conservative, to put them in a very highly
11 traveled area.
12 Q Well, I guess we can, I -- we can talk about
13 whether there are more, you know, more congested areas than
14 Georgia Avenue or more areas with slow-moving traffic or
15 more, more idling than Georgia Avenue.
16 A Well, there are. There certainly are.
17 Q All right. Let me ask you, when there's a doubt
18 as to background levels, according to the COG report, don't
19 they use a technique called saturation monitoring?
20 A They can. I don't think it's -- in my opinion,
21 for PM 2.5 that you're referring to here, I think that it's
22 pretty well established that the background level is far
23 below the 12.
24 Q No. It's well established, on the basis of a
25 monitoring system, which the EPA says is not --

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1 MR. GROSSMAN: Well, you can't testify.
2 MR. SILVERMAN: Okay. Sorry, right.
3 BY MR. SILVERMAN:
4 Q But saturation monitoring, isn't that a way of
5 quickly and with, somewhat less expensively to, sort of
6 ground-truthing the regional monitors, to tell whether
7 regional monitors, the results of regional monitors are
8 reflected in certain hot spots? Is that accurate?
9 A That certainly is a technique that can be used.
10 Q Did you use it?
11 A We did not.
12 Q Okay, thank you. One thing about urban and
13 rural -- when you did your hamburger study, which,
14 incidentally, I think was great, the New York Times picked
15 it up, there was a commentary, you used rural values?
16 A We made the comparison with rural -- I noticed
17 that after the fact as well. We could do it rural. Urban
18 would show the same relative.
19 Q But you did it rural.
20 A We did, we did a generic example.
21 Q You did it rural because that's what the EPA would
22 require you to do?
23 A No. We did --
24 Q Oh, you just picked it arbitrarily?
25 MR. GROSSMAN: Well, let him answer the question.

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1 Don't keep on interrupting.
2 MR. SILVERMAN: Okay, sorry.
3 THE WITNESS: We did a simple screening model, and
4 it was done rural, and we showed a relative comparison. I
5 could do the same thing urban, and the relative comparison
6 would be very similar. My position remains that within the
7 mall area itself and those locations adjacent to the mall,
8 that that would be an urban-type characterization per EPA
9 land-use classification.
10 BY MR. SILVERMAN:
11 Q But when you're looking at Elevation Burger, you
12 did rural.
13 A I did a generic -- I mean, I did generic modeling
14 analysis.
15 Q Okay.
16 MR. SILVERMAN: I just have one further question,
17 and if this is beyond the scope, I hope you'll allow it.
18 BY MR. SILVERMAN:
19 Q The word depot, fuel depot, do you know that the,
20 one of the primary definitions of fuel depot is a warehouse?
21 A I have no idea. I've never heard a fuel depot
22 compared to a warehouse.
23 MR. GROSSMAN: It's not really beyond the scope
24 because the witness testified, criticizing your
25 characterization of it as a fuel depot --

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1 MR. SILVERMAN: Thank you.
2 MR. GROSSMAN: -- and so I think you're certainly
3 entitled to ask a question about it.
4 BY MR. SILVERMAN:
5 Q You know what? I Googled Montgomery County fuel
6 depots. I just want to show you some of them.
7 MR. GROSSMAN: And since you've handed out
8 something here, let's mark it as an exhibit.
9 MR. SILVERMAN: Thank you.
10 MR. GROSSMAN: Exhibit 210 and this is -- what is
11 DEMS? It says Montgomery County, Maryland, DEMS Fuel Sites.
12 What does DEMS stand for?
13 MR. SILVERMAN: Don't know.
14 MR. GROSSMAN: 210 is --
15 MR. SILVERMAN: It was the first thing that came
16 up in Google, sir.
17 MR. GROSSMAN: -- Montgomery County, Maryland,
18 DEMS, whatever that means --
19 MR. GOECKE: I believe it's DFMS.
20 MR. GROSSMAN: Oh, is that what it is, DFMS?
21 Okay. Should have been wearing my glasses. DFMS Fuel Sites,
22 and what does this exhibit purport to be, Mr. Silverman?
23 (Exhibit No. 210 was marked
24 for identification.)
25 MR. SILVERMAN: Just what the word depot is

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1 because my use of the word depot was questioned, and I would
2 point out that in Silver Spring Highway Maintenance, there's
3 a depot and they do 34,000 gallons and the Council Office,
4 this very building seems to have a fuel depot which has
5 24,000. It's not called a depot, but comparable facilities
6 throughout the county are called depots.
7 BY MR. SILVERMAN:
8 Q It's just a word for our regional storage
9 facility, isn't it?
10 A Well, that was one of the terms. You also used
11 fuel distribution center, and a fuel distribution center --
12 Q Well, regardless, is a fuel distribution center --
13 A -- Mr. Silverman, generally processes billions of
14 gallons of gasoline. So I took exception to trying to
15 portray a gas station as a fuel distribution center, which
16 it is not.
17 Q But you don't think this gas station is any big
18 thing, I take it, from your testimony?
19 MR. GOECKE: Objection.
20 THE WITNESS: I didn't say anything of the kind.
21 MR. GROSSMAN: Well, no, I think it's a little
22 colloquial, but I'm going to allow the question. Go ahead.
23 BY MR. SILVERMAN:
24 Q In fact, when I --
25 MR. GROSSMAN: Well, no. He -- I overruled the

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1 objection. So the question is, you don't think this fuel,
2 this gas station is any big thing. Do you have an answer to
3 that?
4 THE WITNESS: In terms of environmental impacts,
5 it is producing negligible impacts to the community. So in
6 that context, no, I do not think it's a big issue in terms
7 of environmental factors.
8 BY MR. SILVERMAN:
9 Q Now, in fact, when you addressed the issue of the
10 National Environmental Policy Act, you said, correctly, that
11 the National Environmental Policy Act, NEPA, does not apply
12 except to federal projects, which is correct, but --
13 A Some federal projects.
14 Q Yes, some, and the federal projects it applies to
15 are those which have significant impacts, is that correct?
16 A Well, I think the purpose of NEPA is to see if
17 there, make sure there aren't significant environmental
18 impacts --
19 Q Right.
20 A -- they don't all have significant environmental
21 impacts that are tested.
22 Q But you don't do an investigation for every
23 project; you do an investigation for those which have
24 significant impacts on you and the environment, is that not
25 correct?

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1 A Well, I mean, the purpose of NEPA, if that's what
2 you're asking about, is to determine if there are
3 significant impacts and to mitigate them. That doesn't mean
4 that every federal study that's studied for NEPA has, in
5 fact, significant impacts.
6 Q Well, that's true but some things are not even
7 studied for NEPA because they don't have significant
8 impacts. There's a preliminary finding, they don't have
9 significant impacts, isn't that correct?
10 A That, I believe that is correct.
11 Q And from your point of view, if this were a
12 federal project, you would say let's not do a NEPA study
13 here?
14 A I certainly would.
15 Q You would, oh. But now, let me call your
16 attention -- I don't know the exhibit number -- there's the
17 school-siting guidelines, which you testified about, and I
18 will reference page 57, which is a, which is a chart.
19 MR. GROSSMAN: Page 57?
20 MR. SILVERMAN: Yes.
21 MR. GROSSMAN: Of what?
22 MR. SILVERMAN: Of the school-siting guidelines,
23 which I think is an exhibit, I hope, I thought.
24 MR. GROSSMAN: I don't recall. Are the
25 school-siting guidelines in the record? I know there was

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1 discussion of it and he had slides discussing it. I don't
2 recall if the actual school-siting guidelines themselves are
3 in the record. Let's find out before we go forward. What
4 exhibit number is it, Mr. Silverman? Is that --
5 MR. SILVERMAN: I don't know.
6 MR. GROSSMAN: Do you have the list of exhibits
7 there?
8 MR. SILVERMAN: The only thing I remember is I
9 paid to get an extra copy to put it in the record. So if
10 it's not part of the record, I don't want to use up too much
11 time, maybe we could make it part of the record here.
12 MS. CORDRY: I think it may have been in --
13 MR. GROSSMAN: Ms. Cordry.
14 MS. CORDRY: -- as part of the attachments that
15 went to the staff report. So I'm looking through that for a
16 moment to see if it's in that exhibit.
17 MR. GROSSMAN: I see. Okay.
18 MR. SILVERMAN: Yes. Also, it was referenced in
19 the EPA report.
20 MR. GROSSMAN: Oh, I know it was certainly in,
21 towards the end of the slide presentation discussed these,
22 and his testimony, obviously, addressed the school-siting
23 guidelines, but all right, so let's assume that it's not in
24 the record yet. Do you want to put it in the record?
25 MR. SILVERMAN: I would like to put it in, yes.

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1 MR. GROSSMAN: All right. So hand it to me and
2 we'll -- all right. This will be Exhibit 211, EPA
3 School-Siting Guidelines.
4 (Exhibit No. 211 was marked
5 for identification.)
6 MS. ROSENFELD: Mr. Grossman, what was 210?
7 MR. GROSSMAN: 210 is the Montgomery County, MD,
8 DM -- Montgomery County, Maryland, DFMS Fuel Sites, a
9 list --
10 MS. ROSENFELD: Thank you.
11 MR. GROSSMAN: -- the one-page list. Okay. And
12 what page are you referring to?
13 MR. SILVERMAN: 57.
14 MR. GROSSMAN: 57.
15 MR. SILVERMAN: There's a table, and I don't need
16 to see it. I'm sure --
17 BY MR. SILVERMAN:
18 Q Is it not the case that the school-siting
19 guidelines list certain close-by land uses which should
20 trigger an analysis? Is that not right?
21 A I'd like to see page 57.
22 Q Sure.
23 MR. GROSSMAN: Okay. That seems fair.
24 BY MR. SILVERMAN:
25 Q And et seq.

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1 A What does that mean?
2 Q That means, that's a word --
3 MR. GROSSMAN: And following, the pages following.
4 MR. SILVERMAN: And following, yes.
5 MR. GROSSMAN: 3, 55, 57, okay. Just look for a
6 second.
7 THE WITNESS: You guys should speak English.
8 MR. SILVERMAN: I'm speaking lawyer.
9 MS. CORDRY: Oh, yes, like environmental stuff is
10 in English? Please. Please. I've read this stuff.
11 THE WITNESS: It is English at least.
12 MS. ROSENFELD: Not the numbers.
13 MR. GROSSMAN: All right, sir, I think that's 57.
14 THE WITNESS: You're referring to the California
15 siting guidance, Mr. Silverman?
16 BY MR. SILVERMAN:
17 Q No. This is the federal.
18 A Federal one, okay.
19 Q It's a recent document, one of the many documents
20 that came out during the pendency of this case.
21 A I recall. Well, what is your question again, sir?
22 I'm sorry.
23 Q My question is, is it not the case that the
24 structure of the document is that EPA lists a number of land
25 uses which are problematic for schools and which should

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1 trigger an analysis? For example --
2 A No, that's not what it says.
3 Q It's not what it says?
4 A No, sir.
5 Q Well, tell me what it says then.
6 A You said that it lists a series of land-use types
7 that are problematic. It lists a series of land-use types
8 that could be potentially problematic, that --
9 Q That require an analysis.
10 A -- that resulted in a screening-level approach to
11 determine -- to screen out the ones that clearly are not a
12 problem --
13 Q Right.
14 A -- and then for those that fail that screen, they
15 certainly have the opportunity to do site-specific analysis,
16 as has been done here.
17 Q So, in other words, there's certain, there's
18 certain land uses that trigger a screening, that trigger an
19 analysis, a more thorough analysis, for example, formerly
20 used defense sites, solid waste facilities, and many others
21 of that sort and including gas stations that pump more than
22 3.6 million gallons a year, is that not correct?
23 A Well, what it's showing, it's showing a
24 screening-level assessment, and you know, if you fail the
25 screen, then yes, then you have an option of doing

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1 site-specific analysis. That's what a screen does.
2 Q And this project fails the screen, right?
3 A Well, I mean, we, we -- it's sort of irrelevant
4 because we've gone way past the screen, have done
5 site-specific analysis that shows there are no significant
6 environmental impacts.
7 Q Yes, but you just testified that for, like, if you
8 did a NEPA-type analysis, you wouldn't even, you wouldn't
9 even get to the, you wouldn't even, you wouldn't be hired
10 because there's no, it's not a big deal, isn't that right?
11 A Well, I shouldn't -- the amount of effort that
12 we've expended in this matter should never have happened,
13 and basically, in terms of air quality, this is a large gas
14 station but in terms of impacts, small, and in terms, was it
15 necessary to go to this level of detail, in my opinion, no,
16 it was not. It's way overkill.
17 Q So you're in disagreement with the EPA's
18 school-siting guidelines, I take it?
19 A Well, the EPA siting guidelines, let me read you
20 what it, what it specifically says. It says: If an LEA is
21 considering locations that are in proximity to air pollution
22 sources that may pose potential risks, an understanding of
23 these potential exposures and risks is essential. Due to
24 the many variables involved, such as those included in
25 Exhibit 5 -- which is in that document -- factors

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1 influencing exposures and potential risks from nearby
2 hazards, in parentheses, assessing risks from air pollution
3 is inherently complex and should be performed by a trained
4 environmental professional with monitoring, modeling, and
5 risk assessment expertise. And that's what's been done
6 here.
7 Q Could you tell me what page you're reading?
8 MS. ROSENFELD: Mr. Sullivan, what page are you
9 reading from, please?
10 THE WITNESS: You know, I'm looking at just a
11 quote. I don't know. I'd have to do a Google search to
12 find the page, and if you electronically just could search
13 for: if an LEA, all caps.
14 MS. CORDRY: Well, that actually said a couple of
15 times. What's the next part of it?
16 THE WITNESS: If an LEA is considering locations.
17 And I would add that CARB has similar, almost exactly the
18 same language in theirs: A screening assessment is not the
19 last stop. If a facility doesn't show no problem with a
20 screen, the next logical step is to use site-specific
21 analysis.
22 BY MR. SILVERMAN:
23 Q Well, once again, you've testified that if
24 you're -- that a gas station of this sort ought not to
25 trigger a NEPA study, but it seems like, don't you agree,

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1 the
2 school-siting guidelines say a gas station of this sort
3 should certainly trigger a further investigation?
4 A Well, I mean, do I agree? I mean, basically, what
5 a screen is doing, to answer your question, the screen is
6 conservatively saying the wind is blowing one direction all
7 the time and dispersion is poor all the time and a person is
8 at that location in the school 24/7 and for their lifetime.
9 I mean, there's nothing wrong with that. That is a
10 screening procedure designed to screen out -- the real small
11 ones, no problem, put them to the side, but it doesn't mean
12 the ones that are left are a potential problem. It just
13 means that with all that degree of conservatism they don't
14 pass and they -- and a site-specific analysis is to make
15 sure there's zero problem, but that would be the next
16 logical step and that's what was done here.
17 Q If this were a federal project, there would be an
18 environmental assessment and analysis?
19 A I would hope, based upon the record here, that
20 future gas stations would not have to go through this level
21 of detail because for this station it's been done and it's
22 shown that the air quality impacts, especially like the fine
23 particulates we were discussing so much, are negligible and
24 really doesn't require this level of detail in the future.
25 Q Okay.

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1 MR. GROSSMAN: I think, Mr. Silverman --
2 MR. SILVERMAN: Yes.
3 MR. GROSSMAN: -- actually, my recollection of the
4 testimony from the June 19th hearing was, when Mr. Sullivan
5 discussed this issue in conjunction with his PowerPoint
6 presentation, he indicated exactly what he's testified to
7 now. That is that there is a screening issue and that, and
8 that there would be, should be further analysis in certain
9 situations and that further analysis was done now. So I'm
10 not sure -- you keep on pressing that point, but he's
11 already said that, that further analysis would be done and
12 it has been done here. So --
13 MR. SILVERMAN: I'm only trying to draw a
14 difference between Mr. Sullivan's opinions and the direction
15 of EPA regulation and guidance. Sometimes he relies on EPA
16 and then sometimes he doesn't, but in this case, it seems to
17 be very clear that this, that when you group a large gas
18 station, when the EPA decides to group a large gas station
19 with a formerly used defense site or a solid waste facility
20 or a truck-handling station, that they see potential risk
21 that Mr. Sullivan doesn't see. And I, you know, I think
22 what he said about this setting a precedent is exactly
23 right, which is why this case scares me so much.
24 They say look at the specific site: Thorough
25 familiarity with the potential school's location, including

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1 local meteorology, topography, and land use of the
2 surrounding areas, page 96. They tell you what to do, and
3 what they tell you to do is do a very thorough
4 investigation, which he purports to do and that's fine --
5 MR. GROSSMAN: Right.
6 MR. SILVERMAN: -- but he's sort of, he's kind of
7 suggesting, oh, this was unnecessary. This was EPA's
8 guidance.
9 MR. GROSSMAN: Well, I think he's saying his, the
10 results of his study, in his opinion, indicated that it was
11 not a significant problem. I'm not, I don't think that
12 he's --
13 MR. SILVERMAN: Excuse me, sir.
14 MR. GROSSMAN: Well, let me finish what I'm
15 saying.
16 MR. SILVERMAN: Go ahead.
17 MR. GROSSMAN: I don't think that he's suggested
18 that once you pass the screening issue, there shouldn't be
19 an additional look at it, because that's what he testified
20 the last time. He said that, as I recall, the CARB, the
21 California standards called for this going further after the
22 screening and so did the EPA. One was 300 feet from the
23 school, I believe. One was 1,000 feet from the school. The
24 school was 800-some-odd feet from it; that's why it would
25 call for some additional looking at. And he's saying that

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1 here that's been done, and he's testified that his results,
2 in his opinion, were that this proposed gas station would
3 not be a significant contributor to fine particular matter.
4 That's what his testimony was, but you're going over and
5 over and over again --
6 MR. SILVERMAN: Well, no. I thought he --
7 MR. GROSSMAN: -- that point. I'm not going to
8 be --
9 MR. SILVERMAN: -- I thought he went a bridge
10 further, too far.
11 BY MR. SILVERMAN:
12 Q I thought you said that this case should resolve
13 all future cases of large gas stations.
14 A Well, I'm not saying resolve all large, all cases
15 that could ever be envisioned, but what I'm saying is, for
16 gas stations of this size, with comparable -- I mean, this
17 has a 99.7 percent control efficiency for their vent
18 releases, not considered in EPA guidance or CARB guidance --
19 facilities like this, that when you're talking about PM 2.5
20 concentrations, even scaling up for MOVES at .01 micrograms
21 per cubic meter, that, that is far below any significant
22 level and suggests that the sources such as this are not a
23 problem.
24 If the station was in a narrow valley with the
25 winds almost always blowing in one direction and didn't have

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1 a vent control and had a school right, you know, 10 feet
2 from the pumps, could that be different? Well, sure, that
3 could be different, but in general, looking at what we have
4 here, the stations of this magnitude, with these controls
5 and the current tailpipe technology and the way they're
6 selling gasoline these days, it doesn't justify the level of
7 effort that's gone into this work.
8 Q Yes. Most, isn't it true, many of the factors you
9 just referenced are new developments, are they not?
10 A Well, certainly the Arid Permeator is relatively
11 new, and the fact that gasoline marketing, which we're
12 talking a lot -- that's what makes a gas station different
13 than other sources, is selling gasoline -- gasoline
14 marketing emissions are going down each year. And so we're
15 talking now, we're doing risk assessments, for example,
16 based upon 2013 technology and doing a 70-year projection.
17 VOC levels will be down three/four times from that by the
18 time that 70-year projection is done.
19 Q Well, we'll see about that in the future. Maybe
20 in 2015 we'll know more. We don't know that much now. But
21 let me just ask you, you mentioned MOVES -- and this will be
22 my last question -- I think you testified, correct me if I'm
23 wrong, that, that the Council of Governments couldn't give
24 you the information you needed to use the MOVES technology.
25 Did you say that?

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1 A We, what I said was, we, when we run MOBILE6 or
2 when we do run MOVES, that we, we, our objective is to get
3 COG's preferred inputs so we make sure we're running the
4 official version of the model. We've always done that for
5 MOBILE6, probably done it in 20 studies. For MOVES, we
6 approached them last fall, we approached them in January,
7 approached them last month, asking for their --
8 MR. GROSSMAN: Last month being?
9 THE WITNESS: June.
10 MR. GROSSMAN: June?
11 THE WITNESS: June of 2013, and asked them for
12 their recommendations. They told us they can give us fleet
13 characteristics but the overall recommendations would not be
14 available until later this summer.
15 BY MR. SILVERMAN:
16 Q Well, the document that Mr. Goecke provided you
17 said that they did their analysis of regional compliance
18 using MOVES.
19 A There have been analysis done in MOVES using
20 default parameters but not --
21 Q Default parameters?
22 A Defaults.
23 Q What is a default parameter?
24 A Default parameter is just EPA's defaults for that
25 county. WCOG has not come up with their own recommendations

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1 yet.

2 Q So you could have used the default parameters?

3 A Let me -- I'm not sure where you're going with

4 this, but the issue is we did --

5 MR. GROSSMAN: Well, answer his question. You

6 could have used the default parameters?

7 THE WITNESS: We certainly could have.

8 BY MR. SILVERMAN:

9 Q Okay. And the default parameters tend to be very

10 conservative, are they not?

11 A I don't know -- I'm not sure that's true, but the

12 truth of the matter is that we did this analysis last fall.

13 During that period of time, MOBILE6 was the official model

14 of choice. And in my report we did account for the fact and

15 acknowledge that MOVES will make some pollutants go up and

16 some go down, and in terms of PM 2.5, yes, for the low

17 idling, very low travel speeds, they go up, and we accounted

18 for that and put that into our report.

19 Q Yes, but the COG report, which you rely on for

20 your background levels, uses MOVES and also, is it not true,

21 there's an appendix to the report, which is a huge file

22 which I couldn't even open, which gives all the data on

23 their MOVES studies? Couldn't you have used any of that?

24 A We could have, but my position again is our, our

25 approach has always been to follow COG's preferred inputs.

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1 They weren't available. They were for MOBILE6. MOBILE6 --

2 Q But the defaults were available.

3 A -- was the model of choice at that time, and we

4 could multiply our modeling by 25-fold and not even approach

5 the significance level. So I don't, I guess I don't, I

6 don't disagree with you. We would have rather run MOVES.

7 We will run MOVES in the future for other projects, but in

8 terms of this project, would it make a significant change in

9 the conclusions --

10 Q Well, I'm not asking you that, sir.

11 A Well, I'm going to -- the answer is no.

12 Q Well, it's just that you said that the information

13 was not available. In fact, there were default values

14 available from COG.

15 MR. GROSSMAN: Well, I think he's answered. I

16 understand.

17 MR. SILVERMAN: Okay, thank you. I have nothing

18 further. Thank you.

19 MR. GROSSMAN: Okay. Do we have any additional

20 cross-examination questions from other parties?

21 MS. ROSENFELD: Oh.

22 MR. SILVERMAN: Can we take a break?

23 MS. ROSENFELD: Yes.

24 MS. CORDRY: Can we take a five-minute break?

25 MS. ROSENFELD: Yes.

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1 MR. GROSSMAN: Mr. Charman, you're saying yes.

2 You've --

3 MR. CHARMAN: I'm not a party.

4 MR. GROSSMAN: No, I know, but you are, you're a

5 participant. So we're going to allow you to ask some

6 questions, but hold on one second, Mr. Charman.

7 Ms. Rosenfeld, what were you saying?

8 MS. ROSENFELD: Yes, I do have supplemental

9 cross-examination for Mr. Sullivan, not specifically in

10 follow-up to Mr. Silverman's cross-examination.

11 MR. GROSSMAN: But, I mean, you finished your

12 cross-examination and there was --

13 MS. CORDRY: Oh, no.

14 MS. ROSENFELD: I finished my cross-examination --

15 MS. CORDRY: Noise.

16 MS. ROSENFELD: -- on noise.

17 MR. GROSSMAN: Hold on one second, Ms. Cordry.

18 I'm not addressing you.

19 MS. CORDRY: Sorry.

20 MR. GROSSMAN: Ms. Rosenfeld.

21 MS. ROSENFELD: No, I finished, I finished my

22 cross-examination on noise. I made it clear that I had

23 supplemental cross-examination on the balance of

24 Mr. Sullivan's report.

25 MR. GROSSMAN: On renditions to the changes to

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1 the --

2 MR. SILVERMAN: No.

3 MS. CORDRY: No.

4 MS. ROSENFELD: No.

5 MR. GROSSMAN: On what?

6 MS. ROSENFELD: On his --

7 MR. SILVERMAN: Air pollution.

8 MS. ROSENFELD: -- on his basic findings --

9 MR. GROSSMAN: Okay. I didn't --

10 MS. ROSENFELD: -- on air pollution.

11 MR. GROSSMAN: -- I didn't recall that, but I'll

12 take your word for it. All right. So what additional

13 questions do you have?

14 MS. ROSENFELD: In terms of how much time I think

15 it will take or in terms of the --

16 MR. GROSSMAN: Well, you can tell me that, I

17 guess. I was just going to let you go ahead and question

18 him, but --

19 MS. ROSENFELD: Oh, okay. I have several hours'

20 worth of questions.

21 MR. GROSSMAN: That is additional time.

22 MS. ROSENFELD: Yes, it is. Yes, it is.

23 MR. GROSSMAN: All right.

24 MR. ADELMAN: Can we take a break?

25 MR. GROSSMAN: All right. Let's --

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1 MR. ADELMAN: Please.
2 MR. GROSSMAN: -- let's take a break until -- it's
3 13 after -- until 20 after 11:00 on that clock. We're in
4 recess.
5 (Whereupon, a brief recess was taken.)
6 MR. GROSSMAN: Let's go back on the record. I
7 think I left my glasses back in my office. So you all have
8 to excuse me if I can't see what you're submitting.
9 MS. ROSENFELD: Oh, we'll give you a moment to get
10 your glasses then.
11 MR. GROSSMAN: That's okay. Sometimes ignorance
12 is bliss. All right. Are we ready to proceed?
13 MR. GOECKE: Yes.
14 MS. ROSENFELD: Yes, sir.
15 MR. GROSSMAN: Ms. Rosenfeld, you may resume your
16 cross-examination.
17 MS. ROSENFELD: Thank you.
18 CROSS-EXAMINATION (Resumed)
19 BY MS. ROSENFELD:
20 Q Mr. Sullivan, in your reports and during the
21 testimony, there's been considerable discussion about using
22 an urban model versus a rural model when you ran your
23 analysis. The EPA distinguishes between urban and rural for
24 air pollution modeling, is that correct?
25 A That's correct.

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1 Q And does the urban or the rural model disperse air
2 pollution more quickly?
3 A The urban model.
4 Q And are you familiar with the EPA standards that
5 dictate how to determine if an area is urban or rural?
6 A I am.
7 Q And where are those standards contained?
8 A They're referenced in the Guideline on Air Quality
9 Models. The technique that we showed in our report was the
10 Auer technique, A-U-E-R technique, which --
11 Q And --
12 A -- which identifies various types of land use and
13 distinguishes between urban and rural land uses.
14 Q And are you familiar with EPA Regulation 70,
15 62818, that contains the standards for urban versus rural?
16 A I'd have to see -- I don't know what that number
17 stands for.
18 Q Sure. It's a Federal Register cite.
19 A Thank you.
20 MR. GROSSMAN: Thank you.
21 THE WITNESS: Ms. Rosenfeld, which page were you
22 referring to?
23 BY MS. ROSENFELD:
24 Q If you could turn your attention to page 68239.
25 MR. GROSSMAN: Shall we mark this as an exhibit?

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1 MS. ROSENFELD: Yes, please.
2 MR. GROSSMAN: All right. Exhibit 212 is EPA 40
3 CFR, Code of Federal Regulations, Part 51. All right. And
4 I take it this is an excerpt from Part 51, or is this all of
5 Part --
6 (Exhibit No. 212 was marked
7 for identification.)
8 MS. ROSENFELD: This is an excerpt from Part 51,
9 yes.
10 MR. GROSSMAN: Okay. So the excerpt is, let's
11 see, runs from --
12 MS. ROSENFELD: They are pages --
13 MR. GROSSMAN: Yes, I see it, 6 --
14 MS. ROSENFELD: -- 68238 --
15 MR. GROSSMAN: From page 68238 to --
16 MS. ROSENFELD: -- through 68254.
17 MR. GROSSMAN: 68254? 240.
18 MS. ROSENFELD: I'm sorry, 240.
19 MR. GROSSMAN: Yes.
20 MS. ROSENFELD: And then 254.
21 MR. GROSSMAN: I don't have a 254 in mine.
22 BY MS. ROSENFELD:
23 Q Mr. Sullivan, does your copy have page 68254 in
24 it?
25 A 68239 I was looking at. Let's see. Mine goes

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1 from 68238 through 68240. That's all I have.
2 Q Okay. Turn your attention to page 68239. There's
3 a section highlighted there called Land Use Procedure. Are
4 you familiar with that provision?
5 A I am.
6 Q And what is your understanding of what that
7 provision does?
8 A EPA has a procedure, as I mentioned, the Auer
9 technique, where for a modeling domain EPA's standard
10 practice is to draw a three-kilometer-radius circle around
11 the source, and then EPA gives very specific guidance in
12 this methodology in terms of land use, in which land use
13 would be classified as urban, in which land use is
14 classified as rural, and the land use as a preponderance of
15 the area is used for the general classification.
16 Q And when you referenced this Auer, A-U-E-R,
17 analysis, is that the same Auer analysis that's referenced
18 in this EPA provision?
19 A Yes.
20 Q And if you could go down to Section E, it says:
21 Of the two methods, the land use procedure is considered
22 more definitive.
23 A Let me -- the population-density method versus the
24 land-use method, that's correct.
25 Q Okay. And so you used the land-use procedure to

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1 determine whether it should be urban or rural --
2 A Yes, we did.
3 Q -- in characteristic? I'm going to show you page
4 27 from your November 19th, 2012, report.
5 MS. ROSENFELD: Mr. Grossman, this is in the
6 record. I'm just handing it out for convenience.
7 MR. GROSSMAN: Okay, thank you.
8 BY MS. ROSENFELD:
9 Q This is identified as Figure 1-8: Topographic Map
10 Showing the Three-Kilometer Radius Circle Used to Define
11 Land Use Characteristics of the Area Surrounding the
12 Proposed Costco Gasoline Station. Is this the
13 three-kilometer radius that's identified in the EPA
14 regulation?
15 A Yes, it is.
16 Q And based on your analysis in this report, what
17 was your conclusion with respect to whether this area was
18 urban or rural in characteristics?
19 A My conclusion was, in terms of the general
20 modeling within the three-kilometer overall area, that the
21 rural designation matched EPA's criteria.
22 Q Okay. And in your November 2012 report on page
23 26, which is Section 1.4 of your report which talks about
24 urban slash rural analysis, the last sentence of that first
25 paragraph, it was confirmed that the rural land-use feature

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1 is appropriate and consistent with EPA modeling guidelines,
2 correct --
3 A That --
4 Q -- that reflects your conclusion?
5 A Our conclusion was that for the
6 three-kilometer-radius overall modeling domain, that the
7 rural option matched EPA's guideline.
8 Q Okay. And the end of the second paragraph there,
9 sensitivity testing has shown that the rural land-use
10 treatment produces modeled estimates that are generally,
11 that generally are approximately two to three times higher
12 than the urban treatment at the closest residential areas,
13 can you explain what that sentence means, please?
14 A I'm trying to -- what does that, what does that
15 sentence start with, Ms. Rosenfeld?
16 Q It's the last sentence in the second full
17 paragraph on page 26 of your November 2012 report.
18 A Thank you. Well, what that, what that is showing
19 is, is the fact that the rural treatment has less
20 dispersion, particularly an issue during nighttime
21 conditions when nocturnal inversions can greatly reduce the
22 ability of the atmosphere to dilute pollution. But I'd like
23 to clarify just for the record that we ran the model both
24 ways because -- if you could bring up page 28 again, I'd
25 just like to provide perspective on that figure, please.

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1 Q Oh, I don't have, I only have --
2 A It was right on the screen. Well, anyway, page --
3 Figure 1-8 of my November report, which was on the screen
4 previously --
5 Q Oh.
6 A -- showed in the center, where the mall was -- it
7 shows the center right in this area here, which is the mall,
8 as being an urban land use; so that the areas adjacent to
9 that mall will be affected by the urban, the urban
10 dispersion along those trajectories.
11 We've further confirmed that in our field study
12 that showed that in this mall area, has, does not -- when we
13 were there for sure, it did not have inversion conditions
14 occurring because of the heat associated with that land use.
15 So it's very different for locations close to this mall area
16 compared to the general domain. That's why we showed it
17 both ways.
18 Q And if I take you back to the Federal Register,
19 page 68239, though, it says that if the land-use type
20 accounts for 50 percent more of certain land-use types, you
21 use the urban dispersion coefficients; otherwise, you would
22 use the appropriate rural dispersion coefficients, is that
23 correct?
24 A Well, that certainly is an EPA policy, when you're
25 modeling a broad area, as we did, that we have -- we're

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1 doing it as rural, which is the appropriate way to do it. I
2 mentioned to Mr. Silverman earlier that that's a
3 conservative representation, but in the context of the
4 Stephen Knolls School, the closest home, and the swimming
5 pool that are right adjacent to the mall property, using
6 expert judgment, I know that those dispersion coefficients
7 are way too conservative for those domains. And I have used
8 expert judgment to show the modeling both ways, and my
9 opinion is that for those close-in receptors, most of the
10 dispersion is going across parking lots and hot surfaces
11 that do not have inversion conditions on a regular basis and
12 have much greater dispersion than the grass and the other
13 areas that comprise most of that three-kilometer-radius
14 circle.
15 Q But doesn't the EPA policy guideline take into
16 account the fact that there would be situations where you're
17 not dealing with 100 percent urban or 100 percent rural?
18 That's why they have that 50 percent breakpoint.
19 A Well, of course. It's guidance, and we followed
20 the guidance. We showed the modeling, rural, in all the
21 plots that we showed, showing the modeling concentrations,
22 but guidance is guidance. It certainly is within my
23 prerogative as a, as a professional air quality analyst to
24 say that those locations close to the mall have different
25 dispersion characteristics, and I'm going to show the

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1 modeling both ways because, in my judgment, the urban
2 characteristics are much more accurate for those sources.
3 Q And you have stated that you were using very
4 conservative modeling parameters in your analysis, is that
5 correct?
6 A We have used conservative parameters in our
7 modeling.
8 Q And to break out the urban modeling is a less
9 conservative modeling analysis, is that correct?
10 MR. GROSSMAN: He did it both ways. I don't
11 understand --
12 BY MS. ROSENFELD:
13 Q -- analysis, is that correct?
14 MR. GROSSMAN: Ms. Rosenfeld, I don't understand
15 your point. He showed it both ways.
16 MS. ROSENFELD: I'm just trying to establish which
17 one is more conservative and which one is less conservative.
18 MR. GROSSMAN: Okay. Well, I think he's already
19 testified to that.
20 BY MS. ROSENFELD:
21 Q When you indicate that the sensitivity testing has
22 shown that the rural land-use treatment produces modeled
23 estimates that generally are approximately two to three
24 times higher than the urban treatment at the closest
25 residential areas, where in your report is that, is that

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1 information reflected? Where is that modeling reflected,
2 those results?
3 A I don't know which specific page, but basically,
4 we've shown the modeling both ways. We've shown urban and
5 rural analyses, and my recollection is that if you compared
6 various pollutants, you compare them, you'd find that rural
7 is more conservative, has higher concentrations and
8 typically two to three times higher.
9 Q Mr. Sullivan, I'm going to hand out to you an
10 excerpt from a handout that you provided earlier in this
11 case. It's Hearing Examiner Exhibit 189(b), and in that
12 exhibit, page 3, which was not numbered in the exhibit but
13 I've numbered it here, you included a chart. And in --
14 there's actually two charts that are shown on this page.
15 The lower chart says: Urban MET Runs NOx One-Hour. Can you
16 explain what urban MET runs means?
17 A This is an urban meteorology, urban dispersion
18 coefficient run. You've highlighted NOx One-Hour.
19 Q Okay. And where do you have a comparative rural
20 comparison?
21 A I don't have a -- I don't have in this chart a
22 rural comparison. The reason I didn't is, as I've
23 mentioned, in my, in my judgment, for these highlighted
24 figures, that urban is the most appropriate, most
25 applicable, and I've shown it based on what I think is the

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1 most accurate assessment.
2 Q But in order to come up with the most conservative
3 assessment, you would multiply the incremental gas station
4 and the total modeled by three, would that be correct, two
5 or three?
6 A No. I mean, if I wanted to complicate the table,
7 I could have shown it both ways, but I'm not going to
8 speculate for each particular cell what the difference will
9 be. We've shown the modeling both ways in other tables, and
10 certainly, from those tables you can get a sense of the
11 general differences.
12 This is a very specific table. This is, this
13 table is calling out the gas station only. You've
14 highlighted that: Incremental Gas Station Only. That's
15 removing the roadways, the cars that are traveling to the
16 gas station, with the hypothesis that, you know, if it
17 wasn't a gas station, it'll be something else there; cars
18 have to travel to get there. The issue is, at the gas
19 station itself as a source, what is that causing in terms of
20 air pollution and, as it's showing, for the closest home,
21 5.5 micrograms per cubic meter compared to 190 standard and
22 .24 for the school and 1.18 for the pool. It's showing very
23 low impacts from the gas station.
24 Q Could you show me in your report where you have,
25 have the information on the rural for the gas station only?

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1 A Do you have my report available?
2 Q I do. This is November.
3 A It's in the, well --
4 Q This is January.
5 A Ms. Rosenfeld, one example would be page 3 of the
6 January 16th report, Table 1-1. This is showing fine
7 particulate concentrations, and it shows them in the upper
8 table using rural values and the lower table using -- oh,
9 that's corrected, rural. The next page, well, these are
10 showing the rural updates. Let's see, urban -- actually, it
11 shows both. I'm sorry.
12 If you look at the, it's page 4 of that document,
13 you see the, the urban run is in the bottom, original versus
14 updated, urban coefficients. Table 1-1, page 2 of 2, is the
15 urban concentrations, and Table 1-1, page 1, are the rural
16 concentrations, and the updated values in both pages are
17 shown in the top. So --
18 Q And in your January 2013 report, do you have
19 updated tables for NOx?
20 A I don't believe we needed to update those. There
21 was a typo in one of these, one of these rows that we
22 corrected for gas delivery; so we did not need to. The
23 original report, you know, would have had NO2 shown as well.
24 Q And actually, if you've got that there, would that
25 be page 68 of your November 2012 report?

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1 A Let me confirm that for you. Page 68 is showing
2 urban/rural concentrations.
3 Q Is that the correct chart?
4 A That's a table. That's --
5 Q Table.
6 A -- Table 1-13.
7 Q Okay. Those are your current predictions for
8 urban and rural for NOx --
9 A Correct.
10 Q -- is that correct?
11 A That's correct.
12 Q And do I read correctly here that the background
13 concentrations that you established were 28?
14 MR. GROSSMAN: Background of what?
15 MS. ROSENFELD: The one-hour of NO2 --
16 MR. GROSSMAN: Okay.
17 MS. ROSENFELD: -- or NOx.
18 THE WITNESS: We did show 28 in there, which was
19 the, was the same as the annual --
20 BY MS. ROSENFELD:
21 Q Okay. And that carried through --
22 A -- and we clarified that. We clarified that
23 later, that the annual actually was lower than that. That's
24 a very conservative value for annual.
25 Q Okay. And that number carried through to your

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1 current? That number hasn't changed, is that correct?
2 A Which number?
3 Q The 28 background for the one-hour.
4 A I don't recall that changing, no.
5 Q Okay. In your Appendix AC, upper case A, upper
6 case C, you did a comparison of MOVES versus MOBILE6 and you
7 stated that MOVES is more conservative for NOx and PM 2.5
8 than MOBILE6. Do you recall that statement, or would you
9 like me to provide you a copy of your report?
10 A That sounds correct.
11 Q Okay. Numerically, how much more conservative is
12 MOVES than MOBILE6.2 for idling vehicles, would you say?
13 A The -- idling vehicles for which, which pollutant
14 are you referring to?
15 Q NOx.
16 A I don't recall off the top of my head. I'd have
17 to be given the figure, the report.
18 Q Do you need the report, Mr. Sullivan?
19 A Do you have the appendicy printed out?
20 Q I do have that appendicy printed out.
21 A Do you know which tab that would be?
22 Q It was in the appendices. I don't have the full
23 appendices with me. It's not in that book.
24 A Okay.
25 MR. GROSSMAN: Thank you.

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1 MS. ROSENFELD: Yes.
2 MR. GROSSMAN: Is this a convenience handout or
3 a --
4 MS. ROSENFELD: That's a convenience handout. It
5 comes from the appendices that were filed by the applicant
6 in the case.
7 MR. GROSSMAN: Okay.
8 THE WITNESS: And your specific question again,
9 Ms. Rosenfeld?
10 BY MS. ROSENFELD:
11 Q Numerically, how much more conservative is MOVES
12 than MOBILE6 for idling vehicles and specifically with
13 respect to NOx?
14 A And for which year are you referring to?
15 Q For the current year, for 2013.
16 A Well, we have -- then I'll go to 2015, which is
17 the closest one to there, and MOVES is approximately, I
18 would say, about 40 percent higher -- actually, I'm sorry,
19 more than that. It's probably, almost a factor of two, not
20 quite.
21 Q When you were talking about the conservatism that
22 you built in for, for example, PM 2, you, as I recall,
23 multiplied emissions for trucks by a factor of 10 to
24 compensate for the fact that you used MOBILE6.2 instead of
25 MOVES. Did I understand that correctly?

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1 A You're referring -- you're not talking about NOx
2 anymore. You're talking about PM 2.5.
3 Q I'm talking right now about PM 2.5. You had a
4 multiplier factor of 10, correct?
5 A I used that as a ballpark to explain the fact that
6 if your, your idling emissions went up by a factor of 10 and
7 explained, we already accounted for two-and-a-half-fold of
8 those factors, that it would approximately end up doubling
9 the impacts, if you consider all sources.
10 Q Did you use any kind of corrective multiplying
11 factor for NOx to account for the fact that you were using
12 MOBILE6.2 instead of MOVES?
13 A Didn't feel it was necessary.
14 Q So you did not do it for, for the vehicles idling
15 in the queues?
16 A Well, let's look at the data for it. For example,
17 if you look at page 68, the gas queue idle for, looking at
18 rural first, is 14, you know, compared to -- so it's not,
19 it's not a particularly high value. The standard is 190.
20 So if it went up by a factor of two even, it would not
21 approach that standard. If you look at the more accurate
22 representation of urban, the queue is five. You can double
23 that and have it 10. It's not anywhere close to the
24 standard.
25 Q So if you were to account for the fact that you

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1 used MOBILE6 instead of MOVES, you would go through these
2 columns and multiply by a factor of two, is what you're
3 saying --
4 A It wasn't --
5 Q -- for each of these sources?
6 A It wasn't quite a -- just for the gas queue source
7 that that's correct.
8 Q And the roadways?
9 A The roadway is not an idling source. So roadway,
10 roadway travel would be a different factor and --
11 Q Is there no idling when cars are waiting at
12 intersections?
13 A Well, that's -- there, yeah, there certainly is
14 idling at the more distant intersections, but the effect
15 that would have on this analysis would be very small. We
16 could break it out. Roadways is combined of free-flow and
17 queuing, but the reality is, Ms. Rosenfeld, that the
18 differences between MOVES and MOBILE6 are not substantial
19 for NOx and, in fact, for some of the pollutants, such as CO
20 and VOC, MOBILE6 has significantly higher emissions than
21 MOVES does. So it does go both ways, just for the record,
22 but --
23 Q I want to make sure I understood you. Did you --
24 I thought in your report you said that MOVES is more
25 conservative for NOx than MOBILE6.2.

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1 A I did.
2 Q Okay. All right.
3 A I just testified to that.
4 Q Okay. Then I apologize. I misheard.
5 A I was just, I was just trying to clarify that, for
6 the record, it's important to note that carbon monoxide and
7 VOCs are more conservatively represented by MOBILE6 and, if
8 we had used MOVES, we would've had lower risk assessment and
9 lower CO. We focused on PM 2.5 because that's been the
10 greatest topic of interest in this case, and we agree with
11 Dr. Cole that the data does support the position that idling
12 vehicles show about a 10-fold increase for PM 2.5. We agree
13 with that and that's why we incorporate that qualitatively
14 into our analysis.
15 Q And I think in the modeling that you did, you made
16 an assumption that there would be 18 vehicles idling in a
17 queue on the adjoining roadways, am I correct?
18 A The queue lengths were different for various
19 roadways. It's based upon EPA's Volume 9 procedures, and
20 it's not 18 in all intersections.
21 Q But you didn't specifically make any, add any
22 multiplier with respect to NOx for that source?
23 A We did not, but as -- again, if we look at
24 roadways as a category and, on page 68 of the November 2012
25 report, and the roadways, which includes free-flow as well

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1 as intersection queuing, you have a value of six micrograms
2 per cubic meter compared to a standard of 190. If you were
3 to double that number, which you shouldn't because most of
4 that is, much of that is free-flow, you would still be well
5 below the standard.
6 So I agree on principle, but the reality was, the
7 difference between MOVES and MOBILE6, with the possible
8 exception of fine particulates, really are not, did not
9 cause that much of a difference, and I focused on PM 2.5
10 because of the discussions I've had for the last several
11 years about that particular pollutant.
12 Q And when you say it didn't cause that much of a
13 difference -- and I'm talking now about NOx -- you mean it
14 didn't cause that much of a difference because the overall
15 values that you generated were so far under the standard
16 that you didn't see any need to create, to --
17 A Yes, and more --
18 Q -- model more accurately?
19 A -- more specifically, it doesn't change
20 conclusions, and the conclusion being that the gas station
21 impacts are far below any standard.
22 Q In Hearing Exhibit No. 175, which was
23 documentation of Slide 25 regarding queues, you noted that
24 you adjusted the queues by modeling 30 cars instead of 20
25 for CO. Did you make --

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1 A Could I please have --
2 Q -- the same correction for NOx?
3 A No. I've mentioned that I did not make any,
4 didn't feel the need to make any correction for NOx for the
5 reasons I've just stated.
6 Q And in his testimony, Jim Agliata stated that the
7 number of visitors during the holiday season could increase
8 from a range of 20 to 30,000 over the course of a weekend to
9 40,000 and maybe more during the holiday season. Did you
10 model any kind of corollary increase in NOx during the
11 holiday season?
12 A I'm not sure what you just, what you -- I'm not
13 sure what those numbers represent. Could you please give me
14 some background, what the 20,000 refers to?
15 Q Well, his testimony was that there would be 20,000
16 to 30,000 visitors over the course of a weekend, an average
17 weekend, and 40,000 and maybe more over the course of a
18 weekend during the holiday season. That would, of course,
19 result in a corollary increase in the amount of -- in the
20 number of vehicles at the mall during the holiday season.
21 Did you do any modeling to account for the increased number,
22 the increased emissions that would occur during the holiday
23 season?
24 A We didn't need to.
25 Q And you did not need to why?

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1 A Because for all -- for the ring road, the parking
2 lots, we extremely conservatively assumed the peak-hour
3 traffic occurs all the time. And so on that basis, as we've
4 done in other parts of this analysis, we've taken explicit
5 steps to overstate, and those impacts substantially
6 overstate the actual traffic.
7 Q And when you say the peak-hour traffic at all
8 times, are you relying on the same weekday peak hour that
9 you relied on for your noise study?
10 A Rely upon the afternoon evening peak, which had
11 the highest traffic --
12 Q Which does not --
13 A -- from the traffic study.
14 Q Which does not include peak weekend which, as we
15 went through during the noise analysis, is higher than the
16 weekday peak, is that correct?
17 A I relied upon Mr. Guckert's traffic study report
18 and took the peak values from that report and modeled them
19 all the time, every hour. So if we're talking about PM 2.5
20 particulates, for example, I'm assuming that the peak
21 maximum one-hour value of traffic occurs all 15 hours the
22 mall is open, which doesn't happen, and I've assumed that
23 for all pollutants. So, yes, we built in a substantial
24 buffer in terms of margin of safety into this analysis.
25 Q The peak hour during the week in September?

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1 A We used that value all the time.
2 Q And the NOx that we're looking at here on page 68,
3 though, that does have a one-hour peak standard, doesn't it?
4 A It does.
5 Q And so assuming that there would be more, more
6 traffic either on weekends or during holidays than during a
7 weekday peak, that hourly standard could increase, could it
8 not?
9 A Well, you're assuming that -- you made a statement
10 that there's been testimony that there's maybe twice as many
11 cars on a holiday weekend, but is there testimony that the
12 peak hour was doubled or that throughout that day there's a
13 lot more cars? I mean, I don't have enough information in
14 front of me to answer your question. I need to see hourly
15 count differences because it may not be higher than the
16 maximum one-hour value in Mr. Guckert's study.
17 Q Well, Mr. Guckert did do specific counts after the
18 warehouse opened, and those counts are in the record. Did
19 you model peak based on those numbers?
20 A We modeled peak based upon the numbers in his
21 earlier report. We used the peak values from his traffic
22 study report dated September 18th, 2012.
23 Q So if, at any point, there would be more vehicles
24 present than Mr. Guckert reflected in his September 2012
25 report, the NOx one-hour values could go up, is that

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1 correct?
2 A They could, but you could, you could frankly
3 double the numbers from the peak that we modeled and you
4 would be well under the standard. So, in my opinion, yes,
5 NOx could be somewhat higher using MOVES compared to
6 MOBILE6, but in terms of the objective, is this station
7 going to meet the standards or not, it really doesn't have
8 any bearing on that because it's so far below the standard
9 that it won't make a difference.
10 Q When you said you could double the numbers and
11 still be under, which numbers are you talking about
12 doubling? Urban or rural?
13 A Well, you probably, you could most likely
14 double -- if you look at the, at the total modeled for
15 either one, you could double the numbers. My argument has
16 been all along that for these closest receptors, which have
17 been the greatest discussion points and interest in this
18 particular project, that the urban is the most appropriate,
19 as shown through the meteorological study we've done of that
20 mall; that the total modeled is 43 for the closest home, 16
21 micrograms per cubic meter for the school, and 15 micrograms
22 for the pool. You could double those numbers --
23 Q I'm sorry. Where are you reading those numbers
24 from?
25 A If you look at the bottom of page 68, the urban

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1 table, total modeled, the third line from the bottom, the
2 total modeled is -- for example, the closest home is 43. If
3 you doubled that number, which I'm not saying you have to
4 do, but if you did double it, you would have 86. If you add
5 your background of 28, you're still well below the 190. So
6 I don't disagree with your premise, but it's really academic
7 because this station is not near any standard.
8 Q And, Mr. Sullivan, where on this chart or where,
9 frankly, in your report do you identify the NO2
10 concentrations for the mall parcel?
11 MR. GROSSMAN: NO2 or NOx?
12 MS. ROSENFELD: Well, they're referenced
13 differently. On this chart he says NO2 but then it's the
14 NOx one-hour standard.
15 BY MS. ROSENFELD:
16 Q So maybe you should clarify --
17 A We're referring to NO2 --
18 Q NO2?
19 A -- AERMOD, because the standard is 102. What are
20 you, what are you -- I'm not sure I follow your question.
21 The mall parcel, what do you mean by that?
22 Q The mall parcel, the mall itself.
23 A What about the mall?
24 Q Well, the mall is part of the special exception
25 application. Did you model for air pollution concentrations

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1 within the mall?
2 A We did.
3 Q Okay. And where are the results for NO2?
4 A Okay. I'll refer to the -- we've plotted them.
5 These are summary tables. We have 8116 receptors; so we're
6 not showing all of them. We're showing three, these three
7 as examples, but if you look at the figures in the report --
8 and I'll have to search for that particular figure, and let
9 me see where that is. We show it in the figure. NOx -- NO2
10 figure would be on page, the, let's see, one-hour would be
11 on page 59.
12 MS. CORDRY: 58.
13 THE WITNESS: 58? Thank you.
14 MS. ROSENFELD: Mr. Grossman, I'm handing this out
15 just for convenience.
16 MR. GROSSMAN: Okay.
17 THE WITNESS: So if you refer to Figure 1-16,
18 that's showing the 98th percentile one-hour NO2
19 concentrations plus background. You notice on that figure
20 isolines in the middle of the mall --
21 BY MS. ROSENFELD:
22 Q Yes.
23 A -- that's because we have 400 receptors within the
24 mall confines included in the modeling.
25 Q And why do you only use the 98th percentile?

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1 A That's what the standard is based on.
2 Q Where do you get that standard?
3 A The EPA, the one-hour NO2 standard is the 98th
4 percentile.
5 Q So EPA sets that standard?
6 A Correct.
7 Q And the 28 background, that's carried forward from
8 your earlier report, is that correct?
9 A Correct.
10 Q And in these, I think they're called isopleths --
11 is that the right word?
12 A Yes.
13 Q The isopleths, I see here the highest number is
14 175, the highest number that's shown on your Figure 1-16,
15 correct?
16 A Correct.
17 Q Are there higher numbers as you move closer into
18 the center of that circle?
19 A That particular circle is showing the impacts near
20 the loading dock and that's, my recollection is, heavily
21 driven by the idling trucks that are idling there. And as
22 I've testified previously, we overstated those by quite a
23 bit because we assumed many miles, many equivalent miles of
24 travel, and I've mathematically showed that that was
25 overstated by quite a bit. Also, this is showing the rural

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1 values because we're showing the overall picture here, and
2 this mall location has very different dispersion
3 characteristics, and I would not expect to see values this
4 high in reality because that's within the mall parcel.
5 Q What was the highest number that you did get on
6 the mall under this Figure 1-16?
7 A We're not showing that in this figure. I don't
8 recall off the top of my head.
9 Q Do you have that data in your appendices?
10 A We certainly have it in our modeling files, but my
11 point is that we already testified that that's a very
12 conservative representation of the loading dock and this
13 particular figure is a general figure, is using rural
14 dispersion, which doesn't even apply, frankly, within the
15 mall complex itself.
16 Q Well, I understand that that's your answer. Maybe
17 a factor, maybe 180, maybe 200 --
18 A I don't have the data. So I'm not going to --
19 Q -- in your professional opinion, you have no way
20 to give me a reasonable answer to that question?
21 A I'm not going to speculate.
22 Q Okay. Was 175 the highest number that you
23 derived?
24 A I'm not going to, I don't -- this is what we
25 plotted. I don't recall. Without looking at my modeling

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1 files, I really can't tell you.
2 MR. GROSSMAN: Mr. Sullivan, what's the NAAQS
3 standard for NO2?
4 THE WITNESS: It's 190 for this one-hour value.
5 MR. GROSSMAN: For the one-hour value?
6 THE WITNESS: Yes.
7 MR. GROSSMAN: That's the same as the NOx?
8 THE WITNESS: Correct. It's an NO2 standard. The
9 emissions are NOx. We're assuming they're all NO2. Sorry
10 for the confusion but it's an NO2 standard.
11 MR. GROSSMAN: Okay. So you're not making a
12 distinction between NOx and NO2?
13 THE WITNESS: We're assuming, we're conservatively
14 assuming that all of the NOx is coming out as NO2.
15 MR. GROSSMAN: Okay.
16 BY MS. ROSENFELD:
17 Q First of all, I understand that you have made some
18 adjustments for the fact that you consider the mall to be
19 urban and not rural, but I just want to ask one more time,
20 this figure, 1-16, is run as rural, as the EPA guidance
21 would dictate, is that correct?
22 A But I just want to -- before I answer you, I'll
23 clarify, I didn't make any adjustments. I ran the model
24 both ways. I ran urban and rural. I didn't change the
25 coefficients, do any of that.

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1 Q Your urban was 100 percent urban? You didn't
2 make, use any averages between urban and rural in coming up
3 with any of your numbers?
4 A No. We -- the choice is urban or rural. We used,
5 we used urban for the closest locations, the pool, the
6 school, and the closest home. And, to clarify, that in our
7 judgment and based upon the short-scale study we did, that
8 the mall environment does not have inversion conditions, has
9 greater mixing, greater heat, that the urban coefficients
10 would apply to those close-in receptors, but I didn't make
11 any adjustments to the modeling procedures.
12 But, yeah, this is a general figure, showing,
13 going out away from the mall, and as I've mentioned, we, we
14 followed EPA's procedure, used the rural dispersion
15 coefficients, because we're only showing one set of -- we're
16 showing just rural in this particular plot. My opinion is
17 that based upon the information available, that within the
18 mall property and the adjacent properties to it, that most
19 of the flow is going over urban land use in a location that
20 has a tremendous amount of heat compared to neighborhood and
21 would have much different dispersion characteristics than
22 the overall modeling domain.
23 Q But the EPA standard says that if you have more
24 than 50 percent rural within a three-kilometer radius, you
25 use rural, is that correct?

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1 MR. GROSSMAN: You've been over this many times.
2 MS. ROSENFELD: Okay. Okay.
3 MR. GROSSMAN: I think he's made his answer very
4 clear of what he did.
5 THE WITNESS: And it's not a standard. It's a
6 guideline.
7 BY MS. ROSENFELD:
8 Q The NAAQS standard here, 190, is that grams per
9 cubic meter?
10 A Micrograms per cubic meter.
11 Q Micrograms per cubic meter. Is that the standard
12 as it's set out by the EPA?
13 A Yes.
14 Q And do they use grams -- micrograms per cubic
15 meter?
16 A It may be converted from ppm, parts per million.
17 Let me see. It's established in terms of parts per billion.
18 Q And how many parts per billion does the EPA set as
19 the limit?
20 A One hundred parts per billion.
21 Q And that's for the one-hour NO2 standard?
22 A Correct.
23 Q And what is the conversion factor?
24 A I don't have that handy.
25 MR. GROSSMAN: Well, let me see if I can -- you're

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1 saying that the standard, the NAAQS standard of 190
2 micrograms per cubic meter is the equivalent of what?
3 THE WITNESS: One hundred parts per billion, if
4 this table is current. I'm looking at the back one.
5 MR. GROSSMAN: One hundred parts --
6 THE WITNESS: Per billion.
7 MR. GROSSMAN: -- per billion. So the NAAQS
8 standard doesn't mention micrograms per cubic meter; it only
9 mentions parts per billion?
10 THE WITNESS: Correct. It has to be converted.
11 MR. GROSSMAN: Okay. And that's the standard for
12 NO2, right?
13 THE WITNESS: Correct.
14 BY MS. ROSENFELD:
15 Q So is it roughly a factor of two?
16 A Well, roughly. I mean, again, without the formula
17 in front of me, I don't want to speculate. We made a
18 conversion from the parts per billion to micrograms per
19 cubic meter.
20 MR. GROSSMAN: Well, what I don't understand is
21 one is in parts per billion, the other one is in weight.
22 How --
23 THE WITNESS: One's in volume.
24 MR. GROSSMAN: -- do you make that --
25 THE WITNESS: Volume. Parts per billion is in

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1 terms of volume, and the rest is in terms of weight per
2 cubic meter. So it's adjusted by the ideal gas law,
3 basically.
4 MR. GROSSMAN: All right.
5 THE WITNESS: It's converting, basically, from
6 volume to mass --
7 MR. GROSSMAN: And --
8 THE WITNESS: -- volume to volume to volume to
9 mass per volume.
10 MR. GROSSMAN: That is a consistent, what you're
11 saying, that's a consistent conversion at any temperature,
12 et cetera, or is this --
13 THE WITNESS: There are some differences by
14 temperature. It's approximated typically at, I think it's
15 25 degrees centigrade, but there are some differences in
16 density by temperature.
17 BY MS. ROSENFELD:
18 Q Do you have that conversion set out anywhere in
19 your report?
20 A No, I don't.
21 MR. GROSSMAN: But I would be interested in
22 seeing --
23 BY MS. ROSENFELD:
24 Q So do you roughly, do you -- I'm sorry.
25 MR. GROSSMAN: Yes. I was just saying, I would be

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1 interested in seeing how the conversion works myself. So if
2 you could supply that.
3 THE WITNESS: I can. It's a standard conversion
4 formula. I can provide that.
5 MR. GROSSMAN: Okay. Yes, thank you.
6 BY MS. ROSENFELD:
7 Q Do the monitors that you work from register in
8 micrograms per cubic meter or in parts per billion?
9 A The actual EPA air data tables? I'd have to -- I
10 don't remember. They're in one of the two. I was, I would,
11 I would speculate micrograms per cubic meter, but I don't,
12 I'd rather not.
13 Q Mr. Sullivan, I'm going to show you a printout
14 from the EPA Web site. The link is shown on this document
15 on the top.
16 MS. ROSENFELD: Mr. Grossman, this will be a new
17 exhibit.
18 MR. GROSSMAN: All right. Thank you.
19 MS. ROSENFELD: Yes.
20 BY MS. ROSENFELD:
21 Q Do you recognize --
22 MR. GROSSMAN: This will be Exhibit 213, and its
23 NO2 values from nearby monitors, 2009 to 2012.
24 (Exhibit No. 213 was marked
25 for identification.)

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1 BY MS. ROSENFELD:
2 Q Do you recognize those as EPA monitoring sites?
3 A They certainly look like they are, yes.
4 Q And does that show monitoring results on the far
5 right-hand column?
6 A It shows, this particular -- it's showing 98th
7 percentile concentrations in parts per billion.
8 Q So these would be the same 98th percentile that
9 you used in your Figure 1-16, is that correct?
10 A I'd have to look at our records to confirm that,
11 but they certainly seem similar in terms of the format.
12 Q Are these reflected in micrograms per cubic meter
13 or in parts per billion?
14 A These are shown in parts per billion.
15 MR. GROSSMAN: I take it that's the ppb?
16 THE WITNESS: Correct --
17 MR. GROSSMAN: Okay.
18 THE WITNESS: -- parts per billion.
19 BY MS. ROSENFELD:
20 Q And just generally, is there a multiplication or a
21 division factor that you would use as just a rule of thumb?
22 MR. GROSSMAN: You mean to convert these?
23 MS. ROSENFELD: To convert.
24 MR. GROSSMAN: He's already said, he doesn't
25 recall that formula; he'll have to -- he'll supply it,

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1 though.
2 THE WITNESS: As I've indicated, we're going to
3 provide the formula. I mean, if you want me to convert
4 numbers, I'd rather do it with the formula rather than just
5 speculate.
6 BY MS. ROSENFELD:
7 Q Isn't the calculation, you multiply it by 188,
8 roughly double?
9 A Well, I showed a, I showed a 100- to 190-fold,
10 but --
11 Q A hundred- to 190-fold, okay.
12 A Correct.
13 Q Okay. So roughly double?
14 A Roughly double there, yes.
15 Q Roughly double, okay. I'm going to show you page
16 17 from your January 16th, 2012, report. In the middle
17 column, which I have added the highlighting for NO2 the 98th
18 percentile one-hour, could you look at that conversion from
19 parts per billion?
20 MR. GROSSMAN: Which column or --
21 MS. ROSENFELD: Oh, I'm sorry.
22 MR. GROSSMAN: -- what am I looking at?
23 MS. ROSENFELD: In the center of the chart --
24 Table 4.1 --
25 MR. GROSSMAN: Yes.

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1 MS. ROSENFELD: -- it says: Summary of Measured
2 Concentrations for CO, NO2, and PM 2.5 Used in Estimated
3 Conservative Background Concentrations.
4 MR. GROSSMAN: Right.
5 MS. ROSENFELD: The middle column says NO2, and
6 under that there's a 98th percentile one-hour, and it says
7 2010 --
8 MR. GROSSMAN: Right.
9 MS. ROSENFELD: -- Beltsville --
10 MR. GROSSMAN: Okay.
11 MS. ROSENFELD: -- and it converts parts per
12 billion to --
13 MR. GROSSMAN: Right.
14 MS. ROSENFELD: -- micrograms per cubic meter.
15 MR. GROSSMAN: I see.
16 THE WITNESS: Well, I mean, like I say, we will
17 clarify the formula. I will, I will go and check our
18 records regarding the conversion formula, but I don't --
19 BY MS. ROSENFELD:
20 Q Well, I think you, I think you --
21 A -- I don't have a position without having my
22 records in front of me to make the calculation right now.
23 MR. GROSSMAN: It looks like roughly double there.
24 MS. ROSENFELD: Roughly double. Roughly double.
25 BY MS. ROSENFELD:

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1 Q So it should be roughly double 52, is that
2 correct?
3 A Well, I want to, if there's an inconsistency, I
4 want to check the records, you know. I think I'd like to be
5 able to look at the formula itself, and I'll confirm these
6 records here versus the tables we discussed earlier.
7 Q Well, this is your chart; these are your
8 conversions. You just gave me your testimony that it should
9 be roughly double. Is 28, which is micrograms per cubic
10 meter, roughly double 52, which is the parts-per-billion
11 number cited there?
12 A No, it is not, and as I mentioned, I'd like to
13 clarify. If there's an inconsistency between these numbers
14 here and the figure we referred to earlier, I need to get my
15 records, confirm which ones are correct and, if there's any
16 clarification needed, to make that clarification.
17 Q And which figure referred to earlier are you
18 talking about?
19 A The figure that showed the NO2 one-hour
20 concentrations.
21 Q 1-16?
22 A Which figure was that again?
23 Q Was it 1-16, this one?
24 A I believe that's correct.
25 Q Okay. Well, you have them both.

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1 A Well, as I've, as I've mentioned, Ms. Rosenfeld, I
2 don't have the formula with me to check it right now, and I,
3 on a question like this, I can get back to you, get my
4 formula, and confirm these numbers, but I don't have, I
5 don't have the means of doing it when I'm testifying. So on
6 a detailed question of this nature, I need to have my
7 calculations and my computer and my formulas. I'm not in a
8 position to answer your full question.
9 Q So --
10 MR. GROSSMAN: It just looks like these were
11 flipped. It looks like the numbers were flipped --
12 MS. CORDRY: No, they're not flipped.
13 MR. GROSSMAN: -- on this because they are
14 roughly, one's roughly half of the other on each column, but
15 it looks like they're -- if in fact the parts-per-billion
16 number is supposed to be larger, it's, or rather, it's
17 supposed to be smaller, then it, here they're flipped and
18 it's larger each time.
19 MS. CORDRY: That's the problem. That is exactly
20 the problem.
21 THE WITNESS: We'll clarify, we'll clarify the
22 issue. I can't do it while I'm here without the formula in
23 front of me.
24 MR. GROSSMAN: Okay.
25 BY MS. ROSENFELD:

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1 Q In your report do you identify where, which
2 monitor you took the 98th percentile parts per billion from?
3 A This is showing Arlington.
4 Q That's right. And what year?
5 A Let's see. The highest of the three would be
6 2010.
7 Q Okay.
8 MS. ROSENFELD: Mr. Grossman, may I see the chart
9 that I just handed you --
10 MR. GROSSMAN: Yes.
11 MS. ROSENFELD: -- the monitor chart?
12 MR. GROSSMAN: That's over here. Exhibits are not
13 to be mixed up.
14 MS. ROSENFELD: Right.
15 MR. GROSSMAN: Thank you.
16 MS. ROSENFELD: And, Mr. Grossman, if we could --
17 MR. GROSSMAN: Yes.
18 MS. ROSENFELD: -- mark that as an exhibit as
19 well, please.
20 MR. GROSSMAN: Okay. So that'll be Exhibit 214
21 and -- so you've converted parts per billion into micrograms
22 per cubic meter?
23 (Exhibit No. 214 was marked
24 for identification.)
25 MS. ROSENFELD: That's correct.

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1 MR. GROSSMAN: Okay. So it's --
2 BY MS. ROSENFELD:
3 Q And, Mr. Sullivan, that chart does show in parts
4 per billion the 2010 concentrations at the Arlington
5 monitoring site, is that correct?
6 A It's showing two columns. It's showing one that
7 says 27.66 and one that shows 97.76.
8 Q And 27.66 would, if rounded up, correlate to the
9 28 background that you've shown on Figure 1-16, is --
10 A That would be consistent with that, correct.
11 Q And what's shown on the other column?
12 A The other column is showing 98 micrograms per
13 cubic meter.
14 Q And how, going back to the 52 parts per billion,
15 how does that convert to micrograms per cubic meter?
16 A Well, are you showing -- what is this column
17 purported to show? The furthest column to the right, what
18 are the units on that? Are those micrograms per cubic
19 meter?
20 Q If we go to Column 26, the one-hour Arlington
21 number, which has a reported concentration of 52 as the 98th
22 percentile parts per billion --
23 A I just -- my only question, Ms. Rosenfeld, was to
24 confirm the last column. Is that -- I'm assuming that's
25 also micrograms per cubic meter, is that correct?

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1 Q Yes, that's correct.
2 A Okay.
3 Q So which one is the correct conversion? Would it
4 be 28 or would it be the 98?
5 A Well, assuming that the actual 52 ppb is correct,
6 it would appear that the 98 may be correct, but I would want
7 to be able to crunch those numbers myself. In terms of the
8 overall --
9 Q Do you need a calculator?
10 A I think I've made it clear that I would need to
11 have the formula and as well as the ability to compute that,
12 and I don't have the formula handy at the moment.
13 MR. GROSSMAN: So let's not keep on asking the
14 same question. I understand your point, but he does not
15 want to venture a figure without having the formula and the
16 calculator. So let's not repeat that.
17 THE WITNESS: Ms. Rosenfeld, in terms of your
18 point, if there's an incorrect background value used, and
19 let's assume your value is correct, it's -- we could clarify
20 that, but it's going to be still under the standard. Well,
21 if you look at the data tables, for example, if you go to
22 the total modeling based upon -- total modeling based upon,
23 say, urban, as a starting point, the closest home, it would
24 be 43 --
25 BY MS. ROSENFELD:

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1 Q I'm sorry. Which document are you looking at?
2 A I'm looking at Table 1-13, page 68. You see it's
3 43 --
4 Q One minute, please. One minute, please.
5 A The bottom portion, we'll do it both ways, but the
6 bottom portion of Table 1-13.
7 Q One minute, please.
8 MR. GROSSMAN: This is, I think, reflected also in
9 Exhibit 189(b) that you handed out, the little handout you
10 gave with the red note on top.
11 THE WITNESS: Right.
12 MS. ROSENFELD: If you'll give me just a minute.
13 BY MS. ROSENFELD:
14 Q Okay. I have 1-13, yes.
15 A And if you look in the first column, the home, NOx
16 one-hour, the total modeled value is 43. If your background
17 was 97, we'd have a 140 versus a 190 standard. If you took
18 the rural, which I'm saying is not applicable, not
19 appropriate for something right next to that mall, the total
20 modeling is 66, and if you made, you added that to a 97,
21 you're getting what, 153?
22 Q One sixty-three.
23 A So my point is, I'll double-check the math and the
24 conversion, but if your, if your value is correct, it
25 certainly doesn't -- we'd want to clarify the record, but it

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1 doesn't change the conclusions.
2 Q Let's go to the urban for just a moment. You have
3 the modeled plus background at a number of 71, correct?
4 A That's correct.
5 Q And that is at the closest home, correct?
6 A Correct.
7 Q And if the differential between 28 and 98 is 70
8 and we simply add 70, that would put you at a number of 141,
9 is that correct?
10 A Well, we're adding to the total -- if we're going
11 to change the background and make it a 97, you're adding
12 that to the 43 total modeled.
13 Q Correct. Okay.
14 A So we're going to take the 43 plus 97 and we get
15 140, and you can compare that to the 190, and you find
16 you're under that standard.
17 Q And to do the same on the rural?
18 A The rural, we'd take the 66 plus the 97; you get,
19 13 carry the one is 163. That's under the standard as well,
20 and as I pointed out earlier, a lot of these impacts are
21 from the -- are affected by the conservative treatment of
22 the loading dock, which is clearly overstated.
23 Q And I believe it was also your testimony earlier,
24 though, that you didn't feel like you needed to make any
25 upward adjustments because you could easily double these

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1 numbers and still be within the standard, is that correct,
2 using the proper background concentrations?
3 A Would it be correct using the proper background?
4 Well, let's, let's --
5 Q Could you --
6 A -- let's see. If you take your 43, which I'm
7 saying is the most applicable, and you double it, make it
8 86, and we're adding 97, 13 carry the one is 183. That's
9 less than 190.
10 Q And, Mr. Sullivan, going to Figure 1-16 --
11 A What page is that on, please? Oh, I got it,
12 sorry.
13 Q Page 58.
14 A Correct.
15 Q Which runs models for the mall parcel, which, of
16 course, also is within the neighborhood as all parties
17 agree, if we were to take the 175 isopleth and correct for
18 the proper background, what number would you get?
19 A Well, we could run, we could run the math,
20 Ms. Rosenfeld, but I've already testified that within the
21 mall parcel itself, the conditions that drive these kind of
22 high values, which would be inversion conditions coinciding
23 with high traffic, are unlikely to occur and are not
24 appropriate. So we could run the math, but it's not
25 appropriate.

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1 Q Please run the math.
2 A You want me to take the 175, subtract 28, 147, and
3 you want me to add to that a 97. You would get a 244
4 mathematically.
5 Q And beyond that, the 150, what would the number
6 be?
7 A Well, it would be 25 micrograms less than that.
8 Q Both well over the EPA one-hour NOx standard, is
9 that correct?
10 A Well, if we, if we use this analysis, which is for
11 rural, and apply it to an urban setting on the mall itself,
12 which that parcel is clearly urban, if we run it that way,
13 certainly you'd get that mathematically. It wouldn't be a
14 realistic number.
15 Q And, Mr. Sullivan, if you were to go back to the
16 Table 1-13 and go to the home --
17 A Back to Table 1-13?
18 Q Yes.
19 A Go to Table 1-13 and go to the home.
20 Q Right, and double the 66.
21 A Well, you're going back to the rural again which
22 I've testified wasn't applicable. You want me to, just
23 mathematically, crunch the numbers?
24 MS. ROSENFELD: Mr. Grossman, could we just have a
25 short break so I can consult with my clients for a moment?

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1 THE WITNESS: How about a lunch break? Just
2 wondering.
3 MR. GROSSMAN: Maybe it wouldn't be a bad idea to
4 break for lunch, and then in the interim, Mr. Sullivan can
5 get his formula and calculator and then answer your
6 questions directly as to that. Would that be an agreeable
7 thing to do?
8 MS. ROSENFELD: Yes. Yes, it would.
9 MR. GROSSMAN: Okay.
10 MR. GOECKE: Mr. Sullivan, would you be able to
11 get that formula?
12 THE WITNESS: Well, I could have somebody in my
13 office, you know, crunch the numbers. My preference would
14 be to look at this and provide a written response and to
15 clarify this --
16 MR. GROSSMAN: Well, you can't do that, you can't
17 do that right this second, but I think that at least
18 breaking for lunch, he'd have an opportunity to get the
19 formula on his calculator so that he could answer to his
20 satisfaction as far as the actual number crunch. If the
21 observation that appears to be correct here is that some
22 columns were flipped here but he's not comfortable answering
23 it without the formula, that'll give him an opportunity to
24 get that so we get more concrete answers on that.
25 So shall we all come back at 1:15? Does that

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1 sound, agreeable thing to do? All right. So we're recessed
2 until 1:15.
3 (Whereupon, at 12:34 p.m., a luncheon recess was
4 taken.)
5 MR. GROSSMAN: All right. We're back on the
6 record. Have you had an opportunity, Mr. Sullivan, to check
7 on the right formula for conversion?
8 THE WITNESS: I have, and I'll, I can first give
9 you the formula for the record --
10 MR. GROSSMAN: Okay.
11 THE WITNESS: -- as you requested.
12 MR. GROSSMAN: Yes.
13 THE WITNESS: And this is based upon the standard
14 temperature and pressure of 25 degrees centigrade.
15 MR. GROSSMAN: Right.
16 THE WITNESS: Micrograms per cubic meter equals
17 parts per billion, ppb, times 46.01 --
18 MR. GROSSMAN: Times 46.01.
19 THE WITNESS: -- which is in molecular weight for
20 this particular chemical, times 40.87, divided by 1,000.
21 And I do agree with Ms. Rosenfeld that 52 parts per billion
22 is the correct --
23 MR. GROSSMAN: Well, let me get the formula down
24 correctly first before we go to the next stage. So you're
25 saying that micrograms per cubic meter equals parts per

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1 billion times 46.01, times 40.87, divided by 1,000, you
2 said?
3 THE WITNESS: Correct.
4 MR. GROSSMAN: Okay. All right. Now let's turn
5 to -- see, I found my glasses. Actually, it turns out I had
6 them in my pocket the whole time. It's old age. All right.
7 So turning to the particular page 17 example, page 17 of
8 your January 16, 2012, supplemental report -- well, wait a
9 minute. That looks like -- January 16, 2012, that must have
10 been --
11 MS. CORDRY: I think that we're misdating on that.
12 That is the 2013 report.
13 MR. GROSSMAN: That's the 2013 report, okay.
14 THE WITNESS: Correct.
15 MR. GROSSMAN: So just the top should say 2013,
16 okay. And we had been looking at the year 2010, the NO sub
17 2 column and where it says parts per billion, 52, and then
18 micrograms per cubic meter, 28. Now, what I wasn't quite
19 sure here is whether or not the columns just got flipped or
20 they were multiplied in the wrong way. I wasn't sure about
21 that. So, first, I'd ask you whether the -- under the
22 parts-per-billion area, what is the correct figure for parts
23 per billion there?
24 THE WITNESS: The 52 parts per billion is correct.
25 MR. GROSSMAN: Okay.

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1 THE WITNESS: That's from the EPA air data set.
2 MR. GROSSMAN: Okay. It's not that the parts per
3 billion was 28 and you just put it in the wrong column?
4 THE WITNESS: No.
5 MR. GROSSMAN: Okay. So then what would be the
6 correct figure then? Instead of 28 on micrograms per cubic
7 meter, what would be the correct figure there?
8 THE WITNESS: The multiplier is 1.88, as discussed
9 earlier. The correct figure would be 97, 98, rounded off to
10 98.
11 MR. GROSSMAN: Okay. So this would be 98. Now --
12 okay, so the multiplier is 1.88. So you're telling me that
13 when I multiply 46.01 times 40.87 and divide by 1,000, I'll
14 come out with 1.88?
15 THE WITNESS: Yes.
16 MR. GROSSMAN: Okay.
17 MS. CORDRY: If you'd like to look up on the
18 screen, Mr. Grossman, I can do that for you right here:
19 1888 divided by 1,000, 1.88.
20 MR. GROSSMAN: Viola.
21 MS. CORDRY: Viola.
22 MR. GROSSMAN: Okay. QED, as we say. All right.
23 So I now return you to the tender mercies of Ms. Rosenfeld.
24 BY MS. ROSENFELD:
25 Q So looking back at Table 1-13 on page 68 of your

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1 November 19th, 2012, report where you had 28 listed as
2 background under both the rural and the urban, the correct
3 number there should be 98 across all lines, is that correct?
4 A That's correct for the, for the one-hour.
5 Q For the one-hour?
6 A Correct.
7 MR. GROSSMAN: I'm sorry, and which -- refer me
8 again to which table this is, on which page.
9 MS. ROSENFELD: It is Table 1-13 on page 68 of his
10 November 2012 report.
11 MR. GROSSMAN: Okay.
12 BY MS. ROSENFELD:
13 Q And so then, Mr. Sullivan, under rural I then
14 would add 66 plus 98, is that correct?
15 A Correct.
16 Q And the total number would be? This is under the
17 home column.
18 A One sixty-four I've calculated.
19 Q And under the school the total would be?
20 A You're still referring to rural, I take it?
21 Q Yes, I am.
22 A I computed 161.
23 Q And for the pool?
24 A One fifty-two.
25 Q And a reminder again, the max is 190, is that

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1 correct?
2 A The standard is 190.
3 Q Okay. And were you able to determine the numbers
4 for the mall parcel?
5 A No, I have not been able to determine that at this
6 point in time.
7 Q Okay. I do believe that your isopleth on Figure
8 1-16, page 58 of your November 19 report, did have a figure
9 of 175 under rural, is that correct?
10 A It did.
11 Q Okay. So 175 plus 98 would be --
12 A I thought we did this before.
13 Q -- I'm sorry, plus --
14 A We went, we did -- I did that calculation.
15 Q You did. You did. The total was 245. And under
16 the urban runs, just for the record, if we could correct
17 those numbers as well, please.
18 MR. GROSSMAN: The urban ones for which --
19 MS. ROSENFELD: This would be the bottom chart on
20 page 68 of his November 19, 2012, report --
21 MR. GROSSMAN: Okay.
22 MS. ROSENFELD: -- Table 1-13, and Mr. Grossman,
23 it looks like this.
24 MR. GROSSMAN: Okay.
25 THE WITNESS: I compute for the home 141; for the

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1 school, 114; and for the pool, 113.
2 BY MS. ROSENFELD:
3 Q And do you have the urban numbers for the mall
4 parcel?
5 A Well, we didn't, we didn't plot -- the plot that
6 we showed was for the, was for rural.
7 Q Do you have those numbers anywhere?
8 A We certainly do in our modeling -- well, let me
9 think. We'd have them in our modeling files for the urban
10 runs. I mean, they're available electronically. I don't, I
11 don't have them in the report.
12 MR. GROSSMAN: My question is, was this conversion
13 error made in any of the other items that were measured?
14 THE WITNESS: Those, I believe, are all direct --
15 the units are in micrograms per cubic meter. So I think the
16 answer is no, but I can certainly confirm that.
17 MR. GROSSMAN: Yes, but I'm asking -- so nitrous,
18 I mean, the NOx and the NO2 measurements we've been talking
19 about --
20 THE WITNESS: That would be the only -- well, the
21 other conversion would have been for carbon monoxide, for
22 CO. That's converted from ppb.
23 MR. GROSSMAN: And was that incorrectly converted?
24 THE WITNESS: I don't believe so but that can be,
25 that can be evaluated.

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1 BY MS. ROSENFELD:
2 Q And going back to Table 1-13 on page 68 of the
3 November 2012 report, under NOx annual there's also the
4 background of 28. Should that also be converted to a figure
5 of 98?
6 A No, but that should be modified for the same
7 reason. The annual we computed to be 24 micrograms per
8 cubic meter.
9 Q Twenty-four instead of 28?
10 A Correct. The actual measured value when converted
11 -- the actual measured value of the annual for that was
12 12.9. We've run the 12.9 times 1.88, came up with 24.17.
13 Q And going back to Figure 1-16 on page 58, which
14 has the isopleths, looking comparatively at Table 1-13, the
15 differential between the rural and the urban for home, you
16 had 66 total modeled background for the home under rural --
17 A Correct.
18 Q -- and 43 total modeled for the urban for the
19 home. What's the differential between those two numbers?
20 A Well, you take your ratio, 66 over 43 -- are you
21 asking me to compute the ratio?
22 Q No, just what's the pure difference in numbers?
23 What's 66 minus 23?
24 A Sixty-six minus 43 is 23.
25 MR. GROSSMAN: So, Ms. Rosenfeld, do I get the

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1 sense of at least a portion of your cross-examination is
2 that you feel that the proper way to analyze this would be
3 using the rural standards because that appears to be what
4 the EPA has recommended for this analysis for at least the
5 radius of three miles and this witness disagrees and says
6 for this immediate area around the mall, should use the
7 urban standard? Is that the, what your, what your --
8 MS. ROSENFELD: We do believe that it should be
9 the urban -- I'm sorry. We do believe it should be the
10 rural standard --
11 MR. GROSSMAN: Right.
12 MS. ROSENFELD: -- because Mr. Sullivan has
13 testified throughout these proceedings that he was using the
14 most conservative model and the most conservative model, of
15 course, would be the rural. In addition to that, even
16 assuming that there is some, some compensation, which we
17 think would be inappropriate, but taking into effect the
18 urban factors, we believe that the numbers have been
19 underestimated because of the use of MOBILE6.2 versus
20 MOVES --
21 MR. GROSSMAN: Right.
22 MS. ROSENFELD: -- which is a significant --
23 there's a significant differential with respect to NO2, as
24 Mr. Sullivan's report indicates, but there's no
25 consideration for peak hour through holiday season. Peak

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1 hour, the evidence in the record shows, is higher on
2 weekends.
3 MR. GROSSMAN: Well, I wasn't asking you to
4 summarize everything. I just --
5 MS. ROSENFELD: Okay. Yes.
6 MR. GROSSMAN: -- I just wanted to make sure I
7 understood what your -- because I don't want to waste too
8 much time on that particular issue because I think you've
9 made your point very clear and -- about bringing out the
10 error in the calculation -- and I think he's, Mr. Sullivan
11 has made his position very clear. So I think we can move
12 along on that. That's my point.
13 MS. ROSENFELD: Okay. On that note, Mr. Grossman,
14 I have with me and I plan to file today with the Board of
15 Appeals a motion for summary disposition of this case. I
16 believe that under the facts that have been established
17 here, with respect to the discrepancy in the numbers as well
18 as the prevailing law, both the EPA guidelines with respect
19 to the peak one-hour as well as -- there are other
20 guidelines that address the fact that peak doesn't
21 necessarily mean peak just at the subject property but that
22 there are other lesser standards that govern the adjoining
23 properties, that in fact the applicant has not proven its
24 case. It has made patently clear its view that if they meet
25 the EPA standards, there is no, no safety issue, no public

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1 health factor at issue.
2 This is a one-hour standard for NOx. The reason
3 for that is because health effects on the residents,
4 workers, and visitors to the subject property can be felt in
5 well under an hour, as discussed in detail in the EPA
6 standards and guidelines. The neighborhood in this case
7 clearly includes the mall parcel. It's undisputed by all
8 parties that it includes the mall parcel, and we think, as
9 laid out much more thoroughly in the motion that I will
10 file, that the facts and the law make that clear and make
11 this case right for summary disposition.
12 MR. GROSSMAN: Well, let me step back to just a
13 procedural issue, and that is whether or not one can have a
14 motion for summary disposition filed with the Board of
15 Appeals while the hearing is proceeding with the Hearing
16 Examiner. So what's your authority for that?
17 MS. ROSENFELD: My authority for that are -- the
18 rule is Board of Appeals Rules of Procedure 3.2.2, motion
19 for summary disposition. The only parameter that I see in
20 that rule is that the motion must be filed at least 20 days
21 before the hearing. That would, in my view, be the hearing
22 before the Board of Appeals, which, of course, is quite some
23 ways off from this point. And so if the --
24 MR. GROSSMAN: I don't think that's what they're
25 talking about by the way they -- when they say the hearing,

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1 that's when they are conducting a hearing in the case. They
2 don't conduct a hearing in a case where my office conducts
3 the hearing. They have a work session at which they
4 consider the recommendation, report and recommendation of
5 the Hearing Examiner.
6 MS. ROSENFELD: In which case we're clearly in the
7 middle of those hearing proceedings --
8 MR. GROSSMAN: Right.
9 MS. ROSENFELD: -- and we're well within the 20
10 days a hearing's been set. So --
11 MR. GROSSMAN: Well, it says within 20 days
12 before, before the hearing.
13 MS. ROSENFELD: Unless otherwise approved by the
14 Board, the motion must be made no later than 20 days prior
15 to the hearing.
16 MR. GROSSMAN: Right, because --
17 MS. ROSENFELD: Now, that either would be the
18 hearings that are conducted by you or it would be -- I know
19 the Board only conducts a work session, but frankly, the
20 Board is the one that makes the final determination in this
21 case. And so it seems to me that they would be the
22 appropriate body to hear a motion for summary disposition.
23 MR. GROSSMAN: They'd be the appropriate body to
24 decide if it should be dismissed ultimately, but what, at
25 least what the practice has been -- and we rarely get a

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1 motion to dismiss per se in our, in our practice -- but when
2 there is a motion to dismiss in a case in which there's a
3 clear legal reason for it to be dismissed before a hearing
4 has begun, we might make a recommendation based on that, if
5 it's filed with us, because the case is actually before us
6 now, and by law the cases must be referred to us for a
7 hearing. And I don't know that this is that kind of a case
8 where you have -- you're basing it on essentially what
9 amounts to a summary judgment based on the hearing, and this
10 is not the kind of situation for a summary judgment. In
11 fact, you'll find, there's a case, an administrative-law
12 case that specifies that you can't have a summary judgment
13 proceeding before an administrative agency without an actual
14 rule that permits summary judgment proceedings.
15 But all of that is more complicated than I really
16 wanted to talk about. I just -- just as a matter of how
17 this would be conducted in terms of this kind of a motion, I
18 would not anticipate that the hearing here would be delayed
19 by the filing of this motion. You can -- obviously, you
20 have an option of doing whatever you think is appropriate,
21 but --
22 MS. ROSENFELD: Well, and --
23 MR. GROSSMAN: -- I suspect, unless I got an order
24 from the Board of Appeals, I would proceed with this hearing
25 on the assumption that they will not be acting on it until

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1 we're finished with whatever we're doing.
2 MS. ROSENFELD: And on that note, the motion for
3 summary disposition rule provides that any party may file a
4 motion to dismiss any issue in a case on the grounds that
5 the application and other supporting documentation establish
6 that there is no genuine issue of material fact to be
7 resolved and that dismissal or other appropriate relief
8 should be rendered as a matter of law. And --
9 MR. GROSSMAN: No, they may have -- they may meet
10 that administrative-law case.
11 MS. ROSENFELD: -- and our motion, of course,
12 makes our arguments in support of those standards.
13 In addition to that, I also will file with you a
14 copy of a motion filed on behalf of Kensington Heights
15 Association, asking that these hearings be suspended pending
16 a determination on the motion for summary judgment, with the
17 exception of the community testimony that's scheduled for
18 tomorrow because people obviously would have already made
19 plans to attend. And, frankly, the events of today, I
20 think, bolster our request on that score because we are
21 waiting for potentially amended plans that we do not yet
22 have, Mr. Sullivan has testified that he intends to
23 supplement his noise report, and I don't know but I would
24 speculate that they likely are going to provide supplemental
25 information on the environmental report and, of course, we

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1 still are awaiting the revised chart, and for us to continue
2 to move forward when there are increasing numbers of expert
3 reports that are, and documents, that are in limbo, I
4 suggest it's premature for us to move forward. But the
5 true, the true basis for our request is the fact that we
6 think that if the case is eligible for dismissal on summary
7 disposition grounds, then it would be a waste of time and
8 resources of everybody -- your office, of course,
9 included -- to move forward.
10 MR. GROSSMAN: I understand. All right. Well,
11 I'm not one to prejudge your motion. Let's file what you're
12 going to file, and then we'll proceed from there.
13 MS. ROSENFELD: Okay.
14 MR. GROSSMAN: But in any event, we're going to
15 proceed throughout today and tomorrow, is my understanding
16 of what you're, you're -- even under your scenario, is that
17 correct?
18 MS. ROSENFELD: No. Actually, we would ask that
19 they be suspended effective immediately; that, at this
20 point, Mr. Sullivan's numbers, he said, could possibly
21 change, certainly for the NOx, possibly for THE CO2; he may
22 determine he's going to go back and change urban and rural
23 numbers based on the discussion today, and frankly, to
24 continue to cross-examine a witness whose evidence is, I
25 think, going to change -- some of it, clearly, he's already

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1 stated, would change -- is a waste of time, quite frankly.
2 MR. GROSSMAN: All right. Ms. Harris, Mr. Goecke.
3 MR. GOECKE: Where to begin? So in terms of
4 staying these proceedings because evidence may change, I
5 think it's been the process throughout this hearing -- and
6 we've tried to comply with this -- that any evidence that
7 was going to be testified about would be presented to the
8 other side 10 days in advance. You know, to the extent that
9 questions have arisen throughout the course of these
10 proceedings, we've had to amend things, we've tried to
11 comply with that, give fair notice to the other side so
12 they'd be able to respond. This is the first we're hearing
13 about this motion, either motion here. So apparently the
14 standard is not applying both ways.
15 In terms of what's going to be supplemented, we
16 will provide the supplemental chart on 189(b)(II), I believe
17 it will be, which is the chart that lacks identification,
18 what the units are, the time units, but --
19 MR. GROSSMAN: Well, there are other issues also,
20 but for clarification, it wasn't just that. So --
21 MR. GOECKE: Okay. But they have cross-examined
22 him on that before, and I don't think they were prejudiced
23 at all from the lack of those qualifiers on the chart.
24 MR. GROSSMAN: Right. They were explained. In
25 the course of the cross-examination, it was explained.

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1 MR. GOECKE: That's what I'm trying to say, yes.
2 MR. GROSSMAN: Right.
3 MR. GOECKE: You know, and in terms of the
4 supplemental noise report, again, we'll provide that far in
5 advance of any time that Mr. Sullivan is going to testify
6 about that, and any other supplements, you know, we'll do
7 the same. To the extent that Ms. Rosenfeld believes it's an
8 inefficient use of time to cross-examine him about those
9 areas, I don't disagree with that and perhaps it may make
10 sense to get the supplements in before we talk about that,
11 but I don't think it's necessary to suspend these
12 proceedings. There's a lot of information that Mr. Sullivan
13 has provided and testified about. This is his fifth day on
14 the stand. And so to point to these relatively minor, I
15 don't want to discount their significance to the other side,
16 but from our perspective, you know, not critical points I
17 don't think, it would just be inappropriate, and we think
18 that would be more an inefficient use of time, especially
19 considering how long it has taken to coordinate the
20 scheduling of this case and all the people we have to
21 coordinate with, the fact that we have Mr. Flynn driving for
22 two hours today, and who knows if we're going to be able to
23 to him today and whether or not he's going to be able to
24 testify tomorrow.
25 So there's a lot of moving pieces here. You know,

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1 the opposition has made clear that they want to get through
2 this, that they're getting worn out, that it's exceeding
3 their resources. I'm not sure if this is an effort to save
4 their resources by stopping the proceedings entirely, but
5 you know, we agree with them to the extent they do want to
6 proceed efficiently and quickly, and I don't think
7 adjourning these proceedings today would accomplish either
8 of those goals.
9 MR. GROSSMAN: Okay. Did you want to rebut that?
10 MS. ROSENFELD: Yes, thank you, and let me go
11 ahead and hand out a copy of our submission. I would
12 certainly like --
13 MR. GROSSMAN: Thank you.
14 MS. ROSENFELD: -- to address the point that this
15 has just been filed today. Frankly, the error that we
16 found, we found last minute going through these reports, and
17 we have spent an extensive amount of time reviewing the
18 lengthy reports that were filed by Mr. Sullivan. They've
19 been updated repeatedly with corrected numbers, corrected
20 evidence, corrected charts, corrected tables, and it never
21 dawned on us that we should check basic mathematical
22 calculations. And having found this over the weekend, quite
23 frankly, it was just -- this was the first opportunity that
24 we had to present this motion, and so it was not in any way
25 intended to prejudice the other side. It simply was the

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1 first time that we've been able to present it.
2 MR. GROSSMAN: All right. Let --
3 MS. ROSENFELD: And we also spent, after first
4 establishing the fact that we thought that there was an
5 error, we, of course, coordinated with our expert to confirm
6 the accuracy before we proceeded with filing anything.
7 MR. GROSSMAN: Okay. We have two things filed.
8 One is a letter to me dated July 30th, and I guess -- I take
9 it that's in effect your motion to stay the proceedings, is
10 that correct?
11 MS. ROSENFELD: That's correct.
12 MR. GROSSMAN: Okay. We'll call that Exhibit 215
13 and that's, 215 is KHCA's motion to stay proceedings
14 pending -- and you're filing the motion to dismiss, well,
15 for summary judgment, you call it summary disposition,
16 you're filing that with the Board of Appeals directly --
17 MS. ROSENFELD: Yes.
18 MR. GROSSMAN: -- is that what you're saying?
19 Okay.
20 MS. ROSENFELD: Yes, but I'm filing one for
21 submission into this record as well.
22 MR. GROSSMAN: Okay. So motion to stay
23 proceedings pending BOA's resolution of motion for summary
24 disposition. And so Exhibit, then, 216 is then a copy of
25 what you're filing with the Board, correct?

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1 (Exhibit No. 215 was marked
2 for identification.)
3 MS. ROSENFELD: That's correct.
4 MR. GROSSMAN: So Exhibit 216 is -- are you filing
5 that today?
6 MS. ROSENFELD: Yes, I intend to file it today.
7 MR. GROSSMAN: Okay. A copy of KHCA's motion for
8 summary disposition filed with the Board of Appeals.
9 (Exhibit No. 216 was marked
10 for identification.)
11 MS. ROSENFELD: And, Mr. Grossman, two additional
12 points.
13 MR. GROSSMAN: Yes.
14 MS. ROSENFELD: Mr. Sullivan, he testified that he
15 did have data to back up numbers on the mall parcel, none of
16 which -- of course, aside from the rural isopleths -- are in
17 any of his data for any of the chemical pollutants that are
18 at issue in this case. And I also wanted to point out
19 that --
20 MR. GROSSMAN: When you say they're not in his
21 data, they're not in what he submitted to us?
22 MS. ROSENFELD: They're not in what he has filed.
23 MR. GROSSMAN: Okay.
24 MS. ROSENFELD: I think he wants to --
25 THE WITNESS: May I answer that, because they're

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1 not in the report but they're in the modeling files. So
2 they have been provided electronically.
3 BY MS. ROSENFELD:
4 Q But I need to go back to those modeling files and
5 then myself extrapolate? That information is not contained
6 in your reports. I --
7 A It's not in the report, but as I mentioned, it's
8 in the modeling files themselves. I mean, that's, that's
9 something that hasn't come up before, but they certainly can
10 be pulled out of the files.
11 Q Right, but you don't have them -- you don't have
12 that information available here, and it's not contained in
13 your reports.
14 MR. GOECKE: But it's --
15 MR. GROSSMAN: What do you mean by available here?
16 He said it's been -- he has said it's been filed. I
17 don't --
18 MS. CORDRY: I'm sorry. Are you saying that those
19 are, like, in one of the appendixes or somewhere, or they're
20 just, those are in your own files that you have?
21 THE WITNESS: The data disk for the modeling
22 files, the modeling output files, would contain the data
23 that would show the concentration for all, all receptors.
24 MS. CORDRY: That's what I'm saying. Is that in
25 your appendixes or, that you provided, or is that just in

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1 your own internal data that you have?
2 THE WITNESS: No, that would have been -- it was
3 on a disk that contained all the output files. My
4 understanding, that's been provided.
5 MS. CORDRY: Okay.
6 THE WITNESS: It's not part of the report. It's
7 provided as part of the disk.
8 MS. CORDRY: There's no report that shows that;
9 there's nothing that's been formally presented other than to
10 go into voluminous files and try to find that?
11 MR. GROSSMAN: There's nothing that requires them
12 to file every piece of data.
13 MS. CORDRY: Well, I understand. I'm just trying
14 to clarify where these numbers are that we are supposed to
15 try to pull this from.
16 MR. GROSSMAN: Well, yes, all right, he's
17 identified it, but if there's a problem with that, I'm sure
18 you can -- we can make sure you have access to it.
19 MS. CORDRY: That's not an exhibit, is it, or
20 anything at this point?
21 THE WITNESS: It is not an exhibit, but the data
22 has been provided and it's available.
23 MS. CORDRY: And would you, like, have to try to
24 identify a particular receptor? I mean, how would you find
25 it within that file?

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1 BY MS. ROSENFELD:
2 Q Are those the multiple receptor grids that you had
3 shown? Like, there's several hundred, aren't there?
4 MS. CORDRY: Eighty-one hundred.
5 THE WITNESS: There's 8100 --
6 BY MS. ROSENFELD:
7 Q Right.
8 A -- regular grid, and there's 16, I think it is,
9 special receptors. I mean, that's something that we have,
10 we can provide, if needed --
11 Q The raw data?
12 A -- I mean, you don't have to go through the files.
13 We can provide it. Dr. Cole can check on it. They're run.
14 They're available.
15 MS. CORDRY: Okay.
16 MR. COLE: Point of privilege since my name is --
17 MR. GROSSMAN: I don't know if you have a
18 privilege, but if your attorney wants to have --
19 MR. COLE: I looked --
20 MR. GROSSMAN: Hold on a second. Hold on. Do you
21 want to allow the gentleman to speak here?
22 MS. ROSENFELD: Yes, I would. Identify yourself.
23 MR. GROSSMAN: Okay. No, I mean, you have to
24 identify yourself for the record.
25 MR. COLE: I'm not opining. I'm just --

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1 MR. GROSSMAN: You have to identify yourself for
2 the record, sir.
3 MR. COLE: Henry S. Cole, Ph.D.
4 MR. GROSSMAN: All right.
5 MR. COLE: In looking at the appendices, it's very
6 difficult to see exactly what you're looking at unless you
7 have the figures displayed on some kind of grid. So my
8 request for the clarity of all parties would be to in fact
9 pull out that kind of data and maybe redo the isopleths --
10 MR. GROSSMAN: I'm not going to require them to
11 redo anything.
12 MR. COLE: It's a request.
13 MR. GROSSMAN: Okay. But let's get back to what
14 we were talking about, Dr. Cole, which is the, which is the
15 motion that was filed. I mean, we've gotten distracted
16 here.
17 MS. CORDRY: Right. And our point is, our point
18 is that he has said that the urban numbers are the ones we
19 should be looking at. We don't have the urban numbers. We
20 can't show -- and he said his rural numbers don't count --
21 we can't add the 70 onto that and show you that we are
22 already well above the standard. We don't have urban
23 isopleths. We can't do those from the data we have.
24 MR. GROSSMAN: Have you asked for that before
25 today?

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1 MS. CORDRY: Well, as I said, we didn't really
2 know that this was going to be the future that we had to do
3 until --
4 MR. GROSSMAN: Well, yes, but I think it's --
5 MS. CORDRY: But the point is, that's why we're
6 saying it doesn't make any sense to keep going. We need to
7 correct -- we've had a glaring error that was made that has
8 made a huge difference in whether we're very close to or
9 above the standard, and the numbers that we need to look at
10 we don't have.
11 MR. GROSSMAN: Okay. I think the first part of
12 that sentence is a fair point. The second part, that you
13 don't have it, if you had requested it, I'm sure that the
14 applicant would have supplied it, but if you didn't know
15 until you found out that you had the glaring error, I can
16 understand the confusion, and I'm not minimizing that.
17 MS. ROSENFELD: And that further goes to my point
18 about not filing the motion. We did want to confirm through
19 Mr. Sullivan that in fact our suspicion was correct. We
20 didn't want to file a motion if in fact we had been
21 misreading the data. His testimony confirmed what we had
22 gleaned.
23 MR. GROSSMAN: Okay. Well, we all haven't read
24 the motion. So we don't really know much about --
25 MS. ROSENFELD: I understand that. I understand

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1 that. I'm just --
2 MR. GROSSMAN: -- about it other than what you're
3 characterizing.
4 MS. ROSENFELD: -- trying to address the timing
5 issue.
6 MR. GROSSMAN: Right. And you said that Mr. Flynn
7 is here, available to testify?
8 MR. GOECKE: He is.
9 MR. GROSSMAN: Okay. And the other side has been
10 notified that Mr. Flynn would be a witness today?
11 MS. HARRIS: Yes.
12 MR. GROSSMAN: Okay.
13 MR. GOECKE: That he would be following
14 Mr. Sullivan, yes.
15 MS. ADELMAN: No. Well, that -- no. We were
16 notified --
17 MR. GROSSMAN: Pardon me?
18 MS. ADELMAN: I received notification, I believe
19 it was Friday, and we had been prepared for Dr. Chase. So
20 we're at a significant, the Coalition is at a significant
21 disadvantage with not enough time to know that the witnesses
22 were going to be changed, and therefore our preparation for
23 what we thought was going to happen today isn't going to
24 happen and we are inadequately prepared.
25 MS. HARRIS: Mr. Grossman, may I?

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1 MR. GROSSMAN: Ms. Harris.
2 MS. HARRIS: Immediately after the last hearing --
3 and I'm losing track of dates -- I had requested from
4 Ms. Rosenfeld, not once, not twice, but three times how long
5 she thought Mr. Sullivan's testimony would take so that we
6 could plan accordingly for subsequent witnesses. It was
7 only, I believe, last week that I finally heard back and
8 said we expect it would take the better part of the day, if
9 not the entire day. Then on last Friday I received an
10 e-mail from Ms. Rosenfeld, requesting who we would be
11 calling after Mr. Sullivan. I happened to be on vacation
12 last Friday; so I did not get to it until Monday morning.
13 At around 7:00 I e-mailed back and said sorry for the
14 apology, after Mr. Sullivan we would be calling Mr. Flynn,
15 but --
16 MR. GROSSMAN: Monday morning, meaning yesterday?
17 MS. HARRIS: Yes, but the fact is that for three,
18 over the course of probably a week, we had requested from
19 them how long is it going to take, your cross, going to take
20 of Mr. Sullivan so we can plan. And ever since the
21 beginning of this, I think we've been very forthright,
22 laying out our schedule, laying out our witnesses, and I'm
23 feeling a little bit like this is a tactical, procedural
24 game almost that's being played to sort of, again, derail
25 this proceeding, which is going on very long, to say the

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1 least.
2 MR. GROSSMAN: All right. I guess, first of all,
3 as far as Mr. Sullivan's continued testimony or continued
4 cross-examination, they do have a fair point about the error
5 creating an issue for them. So -- and since he has to come
6 back anyway for this other, for this other testimony,
7 perhaps it wouldn't be a bad idea for the cross-examination
8 of Mr. Sullivan to discontinue at this point.
9 It seems to me that the direct of Mr. Flynn could
10 take place, even if we don't go, have them go forward with
11 their cross-examination today if in fact they feel that
12 they're not prepared to do that, but at least we could move
13 forward in that regard. How long do you anticipate
14 Mr. Flynn's direct to be?
15 MS. HARRIS: Approximately two or three hours.
16 MR. GROSSMAN: Okay. Well, that would probably
17 work. Does that sound like that would work, Ms. Rosenfeld?
18 MS. ROSENFELD: That would be acceptable --
19 MR. GROSSMAN: Okay.
20 MS. ROSENFELD: -- to KHCA.
21 MR. GROSSMAN: All right. All right. So we have
22 yeses all around. So why don't we do that. At least we'll
23 occupy the rest of today, and tomorrow we have -- well, an
24 opportunity this evening to take a look at the, at the
25 motion and the request to delay, but we're certainly going

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1 forward tomorrow with the, with testimony from the public in
2 the morning, and then we'll see where to go from there.
3 Yes.
4 MS. ROSENFELD: Mr. Grossman, and the events
5 leading to the motion and to today's cross-examination was
6 something that we only recently discovered. So we really
7 were not anticipating today to go the way it is. We would
8 like to ask that cross-examination of Mr. Flynn be deferred
9 until Friday because we really hadn't anticipated moving
10 forward with Mr. Sullivan and other witnesses who won't be
11 here.
12 MR. GROSSMAN: Right. I don't think that's going
13 to be a problem because it's now 2:00. If his direct exam
14 takes two to three hours --
15 MS. ROSENFELD: Yes.
16 MR. GROSSMAN: -- then we'll be finished with
17 today, in any event.
18 MS. ROSENFELD: Right.
19 MR. GROSSMAN: So, as far as the -- yes.
20 MR. ADELMAN: Given that we don't know how many
21 citizens will be testifying tomorrow --
22 MR. GROSSMAN: Yes.
23 MR. ADELMAN: -- one concern, I think, the
24 Coalition would have would be the possibility that the
25 afternoon would end up being, quote, free and that you would

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1 then say we should proceed with the cross-examination of
2 Mr. Flynn --
3 MS. CORDRY: And that's what we're saying, Friday
4 on that.
5 MR. ADELMAN: -- and that presents a problem.
6 MR. GROSSMAN: Okay. And Ms. Harris.
7 MS. HARRIS: In a normal course of a proceeding,
8 one puts on a witness, the other side crosses them probably
9 within three minutes of the conclusion of the direct. The
10 fact is that the needs analysis, the initial one, was filed
11 back in November; the other, the subsequent one was filed
12 more than 10 days ago. There's been plenty of time for the
13 opposition to prepare for Mr. Flynn. And so I would
14 suggest, as we had discussed this morning, that if there's
15 time tomorrow afternoon, that Mr. Flynn, we put him on for
16 cross on Wednesday afternoon and, if not, then on Friday.
17 MR. GROSSMAN: Right. I would say if it weren't
18 for the fact that these reports were filed well in advance,
19 I'd feel more comfortable with your suggestion that you
20 can't even proceed tomorrow afternoon with the
21 cross-examination of Mr. Flynn, but it seems to me that
22 since you've had the reports for some time, that there
23 shouldn't be a problem with cross-examining Mr. Flynn
24 tomorrow afternoon if that in fact is free. So let's --
25 MS. ROSENFELD: Well, I would like to say that

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1 we've not been sitting on our hands during this period of
2 time. We've been preparing for Mr. Sullivan's
3 cross-examination. We've prepared for Mr. Cronyn's
4 cross-examination. We have prepared for Dr. Chase's
5 cross-examination and the expectation that they would be the
6 next order of witnesses. So not anticipating that we would
7 be having to prepare for a fourth witness when we thought
8 that those would be the three moving forward this week, for
9 us to try now and respond -- I appreciate that we've had
10 that information, we've had a lot of information --
11 MR. GROSSMAN: Sure.
12 MS. ROSENFELD: -- since last November, but
13 frankly, it really puts us under the gun.
14 MR. GROSSMAN: Well, let's, first of all, let's
15 proceed at this point with Mr. Flynn and see how far we get,
16 and then we'll face that next question this evening when we
17 complete or if we complete Mr. Flynn's direct examination.
18 MS. ROSENFELD: Okay, thank you.
19 MR. GROSSMAN: And is there anything else of
20 Mr. Sullivan before we temporarily let him go?
21 MS. HARRIS: No.
22 MS. ROSENFELD: One, from our point of view, one
23 glaring omission from his report is the lack of data with
24 respect to the mall parcel. It's our view that the mall
25 parcel is within the neighborhood and that the mall parcel

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1 needs to meet the EPA standards.
2 MR. GROSSMAN: I'm sorry. This is?
3 MS. ROSENFELD: The mall parcel itself.
4 MR. GROSSMAN: Yes. You're saying one glaring
5 error from whose report?
6 MS. ROSENFELD: From Mr. Sullivan's report --
7 MR. GROSSMAN: Yes.
8 MS. ROSENFELD: -- is the fact that there is
9 scant, if any, evidence of modeling and emissions levels of
10 these various pollutants within the mall parcel itself.
11 MR. GROSSMAN: Yes.
12 MS. ROSENFELD: One of the standards is whether or
13 not there is -- there will be adverse health effects for the
14 residents, visitors, and workers in the area of the subject
15 property. That includes the mall parcel, and from my point
16 of view, if they expect to meet their burden of proof, that
17 is an element that needs to be included.
18 MR. GROSSMAN: Okay.
19 MS. ROSENFELD: Just to save us yet another round
20 of reports should I raise it after his next submission.
21 MR. GROSSMAN: All right, fair enough. Anything
22 further that we should say about Mr. Sullivan before --
23 they're not, you're not required to do anything as a result
24 of this. This is -- I think that Ms. Rosenfeld is giving
25 you a heads-up as to a position they're taking, and you can

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1 do anything that you think is appropriate regarding that
2 heads-up, okay?
3 MR. GOECKE: Right. Right. Well, I believe
4 Mr. Sullivan's already testified about extensive modeling at
5 the mall site on direct examination.
6 MR. GROSSMAN: I'm not commenting on the evidence.
7 I'm just saying this is what Ms. Rosenfeld is saying. Fair?
8 MS. ROSENFELD: Fair, thank you.
9 MR. GROSSMAN: Okay. All right then --
10 MS. HARRIS: I think we --
11 MR. GROSSMAN: -- thank you, Mr. Sullivan, and --
12 MS. HARRIS: -- we may need a two-minute
13 readjustment of exhibits, two minutes to --
14 MR. GROSSMAN: All right. So when do you want to
15 come back? When you say two minutes, 1:15?
16 MS. HARRIS: I mean, really, five minutes is fine.
17 MR. GROSSMAN: Okay. All right. So it's seven
18 after 1:00. We'll come back -- I mean, 2:00 rather -- we'll
19 come back at 2:15. Sorry, Mr. Sullivan, but you're going
20 to, you're going to be back again.
21 THE WITNESS: Five days. It feels like my office
22 away from home, sitting here.
23 (Whereupon, a brief recess was taken.)
24 MR. GROSSMAN: Back on the record again. I've had
25 an opportunity to at least take a quick look through the

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1 motion for summary disposition and to read the request to
2 postpone the hearing. I'm not going to postpone the
3 hearing. I don't believe that you can, under the Board rule
4 cited, can file a motion for summary disposition with the
5 Board in the middle of a Hearing Examiner hearing. So
6 that's one thing, and I seriously question whether this can
7 be a case characterized as one that's right for summary
8 disposition, in any event, but I don't find a basis for
9 postponing the hearing. So I figured I'd tell you as far in
10 advance as necessary or as possible so that you would all
11 have an opportunity to contemplate it.
12 MR. SILVERMAN: Mr. Grossman --
13 MR. GROSSMAN: Yes, sir.
14 MR. SILVERMAN: -- just one procedure, is there
15 such a thing as a directed verdict? Can you direct a
16 verdict?
17 MR. GROSSMAN: No, I can't direct anything
18 because -- my power here is power to recommend. I have the
19 power to fact find and recommend a disposition and
20 conditions, but I have no power to grant dismissal on this
21 kind of case; so -- dismissal or directed verdict, whatever
22 you want to call it. They don't even call it directed
23 verdict anymore, the feds anyway, but they --
24 MR. SILVERMAN: Yes. They don't want too many,
25 yes.

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1 MS. CORDRY: Or, again, any -- do you have any
2 authority to file, to rule anything, an equivalent of a
3 motion for -- if someone brought out what you would view as
4 a dispositive point early in the case, do you view it's
5 necessary to go through the entire case --
6 MR. GROSSMAN: If it were --
7 MS. CORDRY: -- under all circumstances?
8 MR. GROSSMAN: Right. If it's a situation in
9 which I feel that there's grounds for dismissal, that is, as
10 a legal bar in some way, then I would probably -- and I
11 think I may have, it's happened so infrequently, but many,
12 many years ago I may have submitted one directly to the
13 Board of Appeals with that, that kind of recommendation
14 before going through the hearing process, but it's been so
15 long ago I can't remember for sure, because my basic
16 obligation is to hold a hearing. However, it does seem that
17 if holding a hearing were a futile gesture, then it would
18 seem to me that the interest of judicial economy or
19 quasi-judicial economy would be in acting on it. I don't
20 see this as that kind of a case. This is a fact-bound case.
21 So I just don't see that as that kind of a situation.
22 Okay. So I presume we are ready then to --
23 MS. HARRIS: Yes.
24 MR. GROSSMAN: -- move forward with Mr. Flynn?
25 MS. HARRIS: Tom, Tom, the witnesses have been

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1 sitting up there. So you can --
2 MR. FLYNN: Okay, thank you.
3 MS. HARRIS: -- go up there when you get your
4 stuff.
5 MR. FLYNN: I just wanted to get my bag.
6 MS. HARRIS: Certainly.
7 MR. GROSSMAN: Mr. Flynn, would you raise your
8 right hand, please?
9 (Witness sworn.)
10 MR. GROSSMAN: All right. You may proceed.
11 MS. HARRIS: Thank you.
12 DIRECT EXAMINATION
13 BY MS. HARRIS:
14 Q Mr. Flynn, can you please introduce yourself to
15 Mr. Grossman and explain what your role was in the Costco
16 special exception case?
17 A Yes. My name is Thomas Flynn. I'm a consultant,
18 working in the field of real estate development and
19 analysis. My company is Thomas Point Associates, and we are
20 located in Annapolis, Maryland. We work around the United
21 States. Costco contacted me and asked me to assess whether
22 there was a need for the gas station that they proposed to
23 build in accordance with the Montgomery County zoning
24 statute.
25 Q And can you please describe your firm and its

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1 qualifications to prepare the study you just mentioned?
2 A Yes. My firm, I started my firm in 1991 as Thomas
3 Point Associates. It's incorporated in the State of
4 Maryland, and I've been working since then around the United
5 States and internationally on real estate development
6 issues. My main, main themes of my work I'd like to
7 describe a little bit.
8 I'm currently working in the field of neighborhood
9 redevelopment in Spartanburg, South Carolina. My work there
10 is for the City of Spartanburg. There's a neighborhood just
11 outside the central business district called the North Side,
12 and it used to be the site of the Spartan Mill, famous
13 textile mill which closed. The neighborhood has been
14 devastated. I am doing the market and economic studies
15 associated to create a development strategy to bring jobs
16 and population back into this neighborhood.
17 A second example of my work is in New Bern, North
18 Carolina, on the eastern end of North Carolina. I'm working
19 for the City of New Bern there to attract a grocery store
20 into the city. They have grocery stores, but they're not
21 very good. The city does not feel that the population is
22 well-served. They're trying to redevelop the area. They
23 feel that it's a food desert, and my expertise is on the
24 determination of whether or not there's a need for a
25 supermarket, whether it's justified based on the facts and,

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1 if so, what type of supermarket and which exact one would be
2 a likely candidate and how do we contact it, what do we
3 present to it, how do we demonstrate that there is a need in
4 a convincing way.
5 MR. GROSSMAN: Let me interrupt for one second.
6 Can you recall the exhibit number for Mr. Flynn's résumé?
7 MS. HARRIS: 17(a).
8 MR. GROSSMAN: 17(a)? Okay. Hold on one second.
9 And --
10 MS. HARRIS: Actually, let me just confirm the (a)
11 part of that.
12 MR. GROSSMAN: -- also, let me adjust my chair.
13 It has let me down in more ways than one. There we go.
14 That's better. Here we go. All right, sir, go ahead then.
15 Thank you.
16 THE WITNESS: Yes, sir. I gave two examples. A
17 third and a different type of work is a job I'm working on
18 right now in El Paso, Texas. I'm working for the Housing
19 Authority of the City of El Paso, and they have hundreds of
20 real estate site properties that they've never really
21 inventoried; they don't know what they're, what they should
22 be doing with them. Many of them are in public housing but
23 some are undeveloped, and by, almost by accident they may
24 have commercial value. So the Housing Authority has asked
25 me to, to evaluate seven specific properties in El Paso as

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1 to their best use and their most productive use from the
2 point of view of the Housing Authority.
3 So those three areas are three things I'm working
4 on right now -- neighborhood redevelopment, development
5 packaging and marketing, and site analysis and market
6 analysis -- but I also work on other subjects, and as you'll
7 see in my résumé and my Web site, I do fiscal impact
8 analysis, I do market research for companies like Costco on
9 demand and need, I do the packaging of development
10 opportunities from a city/public point of view, and I do
11 marketing of, for economic development organizations on how
12 to present themselves.
13 So these have been the main themes of my
14 activities as a corporation since 1991. Right now it
15 happens that I am a one-person corporation. I am a
16 subchapter-S corporation. I'm a sole employee. I have had
17 as many as five employees. I often use subcontractors as
18 consultants. The main capability that I promote is my own
19 expertise in the field of real estate development and
20 analysis, primarily from a public-private perspective.
21 BY MS. HARRIS:
22 Q Thank you. Can you also please explain your
23 personal qualifications to undertake this work?
24 A Yes. I was born in Bridgeport, Connecticut, grew
25 up there and went to Holy Cross College and then went into

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1 the U.S. Navy. I served in the Navy in various places for
2 four-and-a-half years and got out and went to graduate
3 school at Harvard University in Cambridge, Massachusetts. I
4 got a graduate degree in city planning in 1976.
5 MR. GROSSMAN: That's an M.C.P., masters of city
6 planning? Is that what that is?
7 THE WITNESS: Yes, sir.
8 MR. GROSSMAN: Okay.
9 THE WITNESS: M.C.P., master's of city planning.
10 I went to work for a company in Buffalo, New York, called
11 Ecology and Environment, and I specialized at that company
12 in the analysis of environmental -- of the economic aspects
13 of, and demographic aspects, of environmental issues. We
14 worked on places like the Alaskan pipeline, the restoration
15 of an island that had been used by the Navy for bombing in
16 the Caribbean, the environmental impacts of consolidation of
17 rail lines. It was a very broad spectrum of activity. I
18 stayed there for two years and then moved to San Juan,
19 Puerto Rico. I was an analyst and what they called a
20 technology agent for the City of San Juan, working for a
21 company called Public Technology out of Washington D.C.
22 That company still exists. My job was to identify
23 improvements in the way the government operated and to try
24 and implement them, and I certainly tried.
25 I then went on to Real Estate Research

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1 Corporation. I felt that real estate was my primary focus
2 of my disciplinary studies and my interests in life and that
3 has proven to be the case. In Real Estate Research
4 Corporation, I developed skills associated with market
5 analysis. We worked on market analysis, technical analyses
6 of properties all around the United States, hotels, stores,
7 shops, residences, all sorts of things, lots of specialized
8 things.
9 After a couple of years there, I went to work for
10 a company in Annapolis, Maryland, that specialized in the
11 real estate issues associated with public-private
12 partnerships. We were in this business at the very
13 beginning of the thought process about how it would go, and
14 it was a very successful company, and we were purchased in a
15 leverage buyout in 1986 and we never got over that. So I
16 went on to form my own company in 1991, and I've been doing
17 that ever since.
18 BY MS. HARRIS:
19 Q You mentioned you had a master's in city planning.
20 Can you expand on your planning experience, please?
21 A Yes. After graduating from Harvard with this
22 master's degree, I took a certification exam and became
23 certified in the general field of planning, and I have
24 literally worked on the fringes of that field --
25 MR. GROSSMAN: Certified by whom, sir?

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1 THE WITNESS: Certified by the American Institute
2 of Certified Planners. It's a part of the American Planning
3 Association.
4 MR. GROSSMAN: Okay.
5 THE WITNESS: I worked in that field since then
6 for hundreds of clients. I often worked for planning
7 authorities, although my focus, as I said, shifted to real
8 estate. I became active in the Urban Land Institute and
9 the, what was then the Council for Urban Economic
10 Development but is now the International Economic
11 Development Council. I served on the board of the
12 International Economic Development Council from 2000 to
13 2006, and I chaired the committee of that organization that
14 qualifies economic development organizations. In my six
15 years in that position, I certified six -- 29 different
16 economic development organizations at city, regional, and
17 county levels.
18 So my general qualifications are in the planning
19 field, and specifically, I have been working as a certified
20 planner but with a focus on real estate economics and market
21 research.
22 BY MS. HARRIS:
23 Q And have you been qualified as an expert witness
24 before the Montgomery County Zoning Hearing Examiner or
25 another governing body?

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1 A I have. I have testified on cases here, four
2 cases, two of them gas stations. One was an Exxon station
3 in Silver Spring. That station was approved, I believe, but
4 never constructed. I also worked on the Freestate station
5 which continues to operate in Germantown, and I worked on
6 two special exception processes for the Wendy's, one of
7 them, or both in Silver Spring, one near Colesville and one
8 in, near this, at this mall.
9 Q Thank you. I'd like to --
10 A I would also add, excuse me, Ms. Harris, I would
11 also add, early in my career I was qualified as a
12 professional witness before the Interstate Commerce
13 Commission. I worked on the economic issues associated with
14 the consolidation of two major railroad cases, the Norfolk
15 Southern and the Southern Railway, and the CSX purchasing
16 another line.
17 Q Thank you.
18 MS. HARRIS: I'd like to offer Mr. Flynn as an
19 expert in the field of market needs and analysis and
20 planning.
21 MR. GROSSMAN: Which cases did you testify in in
22 terms of market needs and planning?
23 THE WITNESS: Of the cases in, here in Montgomery
24 County, all four were based on need, question of need --
25 MR. GROSSMAN: Okay.

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1 THE WITNESS: -- that is, the two gas stations,
2 the Freestate and the Exxon, and the two Wendy's.
3 MR. GROSSMAN: Okay.
4 BY MS. HARRIS:
5 Q What did Costco ask you to do in connection with
6 the subject special exception?
7 MR. GROSSMAN: Well, we haven't --
8 MS. HARRIS: Oh, I'm sorry. I'm sorry.
9 MR. GROSSMAN: -- we haven't completed the
10 voir dire yet. Opposition, do you wish to examine the
11 witness on his qualifications? Mr. Silverman.
12 MR. SILVERMAN: I just have one question which was
13 exactly Ms. Harris's question: What did Costco ask you to
14 do in connection with this case?
15 MR. GROSSMAN: Well, that's not really going to
16 his qualifications.
17 MR. SILVERMAN: Well, I think it is. I just want
18 to know.
19 MR. GROSSMAN: I'll let you ask it, but I think
20 it's a little bit different than -- go ahead, sir.
21 THE WITNESS: Yes, sir. Costco asked me to
22 determine whether I felt that a need existed based on the
23 statute of 59-G-1.24, whether a, which stipulates, whether a
24 need exists for the proposed use to serve the population in
25 the general neighborhood, considering the present

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1 availability of identical or similar uses to that
2 neighborhood. They asked me to interpret and answer whether
3 or not there was a need based on that requirement.
4 MR. SILVERMAN: Did they ask you to help them make
5 a decision as to whether to build here or just to justify --
6 THE WITNESS: No, they did not.
7 MR. SILVERMAN: Okay.
8 MR. GROSSMAN: All right. Any other questions
9 regarding the witness's qualifications?
10 MS. ROSENFELD: The two cases where you testified
11 on need for gas stations here in Montgomery County, were
12 those, did you testify -- were you qualified before the
13 Hearing Examiner and before the Board of Appeals?
14 THE WITNESS: Yes.
15 MS. ROSENFELD: And do you remember what years,
16 approximately how long ago those cases were heard?
17 THE WITNESS: Yes. I think the --
18 MR. GROSSMAN: I think I had both of those cases.
19 THE WITNESS: Yes, sir. Yes, sir, you had both of
20 them. 2005, 2008, maybe.
21 MR. GROSSMAN: One of them was withdrawn before --
22 I mean, it went forward at the hearing, but it was
23 withdrawn, the State --
24 THE WITNESS: The Freestate.
25 MR. GROSSMAN: Freestate one.

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1 THE WITNESS: Yes, sir.
2 MR. GROSSMAN: And the other one, that other -- I
3 think we're talking about the same Exxon.
4 THE WITNESS: Yes, and so in -- near 198?
5 MR. GROSSMAN: Yes, I believe so, but in any
6 event, all right.
7 MS. CORDRY: Okay. So just to clarify then, are
8 you saying one was withdrawn and one was approved but not
9 built; so neither of those stations had been built that you
10 testified about?
11 THE WITNESS: One had already -- the Freestate
12 already existed.
13 MR. GROSSMAN: They wanted to expand.
14 MS. CORDRY: Oh, okay. So the expansion, you were
15 dealing with an expansion at that point?
16 THE WITNESS: Excuse me?
17 MS. CORDRY: I'm sorry. So the Freestate was an
18 expansion issue?
19 THE WITNESS: Yes, ma'am.
20 MS. CORDRY: Okay. Okay.
21 MS. ROSENFELD: And that's the one that was
22 withdrawn?
23 THE WITNESS: Yes.
24 MS. ROSENFELD: And the other one, the one on
25 Maryland 198, was that one ultimately built or not?

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1 THE WITNESS: No, it was not built. I shouldn't
2 say 198. I believe it was New Hampshire Avenue.
3 MR. GROSSMAN: Any other questions regarding --
4 MS. ROSENFELD: Do you know why it wasn't built?
5 THE WITNESS: Yeah -- well, I'm not sure. I don't
6 want to speculate. I know that there were many issues with
7 the neighborhood in terms of fencing and visual impacts and
8 things like that.
9 MR. GROSSMAN: Believe it or not, there was
10 another unusual gas station case and I had it.
11 MS. ROSENFELD: Do you know if it was because
12 ultimately there was not a need for the gas station at that
13 location?
14 THE WITNESS: No, I believe that the Hearing
15 Examiner and the court accepted the need that we
16 demonstrated for that station. That was not the reason it
17 did not proceed.
18 MR. GROSSMAN: If we are talking about the same
19 case, there was a condition recommended that a fence be
20 built on land that was not part of the gas station property
21 itself, and this created some consternation in the Board, as
22 I recall, although the landowner at the time agreed to that
23 proposition of a fence being built on his land. And my
24 recollection is that it was, the Board did approve the
25 special exception with that, with that condition, but it

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1 was, you know, a somewhat unusual situation, but that was
2 years ago.
3 All right. Any other questions regarding this
4 witness's qualifications?
5 MS. ROSENFELD: I have no other questions.
6 MR. GROSSMAN: All right. Anything further?
7 MS. HARRIS: No.
8 MR. GROSSMAN: All right. Based on this witness's
9 recited qualifications on the stand and on his resume,
10 Exhibit 17(a), I accept him as an expert in market needs and
11 you said in planning.
12 MS. HARRIS: Correct.
13 MR. GROSSMAN: You plan to ask him questions about
14 planning?
15 MS. HARRIS: Not directly, but I think that you
16 can't evaluate the market need without some interwoven
17 planning components, and given his --
18 MR. GROSSMAN: Okay.
19 MS. HARRIS: -- education and experience, I want
20 to make sure --
21 MR. GROSSMAN: Okay. Market needs and interwoven
22 planning, how's that?
23 MS. HARRIS: Perfect.
24 MR. GROSSMAN: All right. You may proceed then.
25 MS. HARRIS: Thank you.

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1 MS. ROSENFELD: One moment, please, Mr. Grossman.
2 MR. GROSSMAN: Okay.
3 MS. ROSENFELD: In his prehearing statement,
4 Mr. Flynn was identified as an expert in the field of market
5 analysis. I'm not aware of anything in his report or
6 anything in the prehearing submission that would suggest he
7 was being called as an expert in planning.
8 MR. GROSSMAN: Want to respond to that?
9 MS. HARRIS: That is true and the primary purpose
10 is the market needs analysis. However, after sitting down
11 with Mr. Flynn, after submitting the initial report almost a
12 year ago, it became clear that he did, was an expert in
13 planning, and as I said, I think the issues are interrelated
14 and we wanted to proffer him as an expert in planning as
15 well.
16 MS. ROSENFELD: Well, then I think I'd like
17 clarification, when he testifies, on when he's testifying as
18 a market expert and when he's testifying as a planning
19 expert and where those areas fall. They're --
20 MR. GROSSMAN: All right. So when --
21 MS. ROSENFELD: -- different areas of expertise,
22 and they go --
23 MR. GROSSMAN: All right. So with that --
24 MS. ROSENFELD: -- to different issues of proof.
25 MR. GROSSMAN: Okay. With that caveat, if that's

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1 the only objection, then we'll, we'll certify him as an
2 expert in market needs and I hate to say interwoven
3 planning, but I chose the word, so I guess I'm stuck with
4 it. And, but when he is going to be testifying regarding
5 planning -- we'll assume everything is regarding market
6 analysis and needs --
7 MS. HARRIS: Unless you hear otherwise.
8 MR. GROSSMAN: -- unless you specify, and then
9 we'll cross that bridge if we have to.
10 MS. HARRIS: Understood, thank you.
11 MR. GROSSMAN: Okay, thank you.
12 MS. HARRIS: May we proceed?
13 MR. GROSSMAN: You may proceed.
14 MS. HARRIS: Thank you.
15 BY MS. HARRIS:
16 Q Mr. Flynn, based on your understanding of the
17 zoning requirements, can you please explain your methodology
18 for evaluating need?
19 A Yes. The first issue that I had to address was
20 what is the general neighborhood. I did that through my
21 experience with this kind of situation and my previous work
22 in this court, using a drive time. I used a drive time of
23 seven minutes from the location of the, of the mall, of the
24 site, excuse me, and that -- if I may point that out here?
25 MR. GROSSMAN: Yes.

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1 THE WITNESS: That is shown on this, on this map
2 right here. I don't think you can see this.
3 MR. GROSSMAN: I can't see that unless you bring
4 it out a little bit further. All right. That's good from
5 right there.
6 THE WITNESS: And --
7 MR. GROSSMAN: This is for your initial estimate
8 of demand, market demand?
9 THE WITNESS: Yes, sir.
10 MR. GROSSMAN: All right.
11 THE WITNESS: My methodology began with a
12 determination of what constituted this general neighborhood.
13 As I said, it's a seven-minute drive. I get -- I work with
14 an entity called Nielsen Claritas. I know we'll be speaking
15 more of that as we proceed in this discussion. They are
16 able to, using my parameters, identify what is a
17 seven-minute drive. This is based on typical driving times
18 and conditions and the streets that are involved.
19 So, as you can see, it's a very jagged map, but it
20 does follow, in a sense, kind of a geographic area, and it's
21 bordered by, goes a little south of the Beltway but it
22 follows the Beltway for the most part. It's here at a park
23 on the west, and north there's, Parklands intended to buy
24 this. That's the reason that drive times are good, is that
25 they sort of follow a market logic.

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1 So the first step in my analysis, beginning
2 several years ago when we started this process, was to
3 define this, what we call the general neighborhood. That's
4 this larger area here, the seven-minute drive. You'll see
5 in the middle of it a smaller area that we call the limited
6 neighborhood, and I'll, in a moment, I'll get to what that
7 means and how it relates to this case. But on the point of
8 how I answered this question of whether there's a need,
9 first of all, I defined this general neighborhood. Then I
10 looked at the population and the workforce and the travel
11 patterns and all of the aspects of this neighborhood, this
12 general neighborhood, that I felt were important, and I
13 estimated, using the same data provided, Verizon Claritas,
14 how much gasoline was likely to be required by the people
15 who are in this neighborhood -- passing through it, in it, a
16 resident of it -- determine the need within the general, the
17 demand within the general neighborhood. I then looked at
18 the stations, the gas stations that already existed in that
19 neighborhood. I know this is important.

20 When we first started this work several years ago,
21 there were 27 stations. I went to each station. I got out
22 of my car. I walked around. I looked at the prices. I
23 looked at the condition of the station. In some cases, I
24 talked with station managers as a mystery shopper, not
25 trying to interrogate them, simply seeing their attitudes

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1 and the way that they ran the station, just my observation,
2 just by being there. I went to every station. I used
3 Verizon Claritas to estimate the amount of gasoline that
4 these stations sold, and then I compared the demand, that
5 is, the amount that the population within the area would
6 require under normal assumptions, with the supply, that is,
7 the amount that's actually being sold, and I found that
8 there was a very significant difference and that that
9 difference was in fact the need that Costco could address in
10 this area.

11 So my conclusion, based on this evaluation of the
12 general neighborhood, was that there was a need that met the
13 requirements of this, of this statute. And I have done this
14 now three times. Three different times I've done the same
15 analysis. I started about three years ago; then a year went
16 by and the data was, had, was kind of gray, so we did it
17 again, and then another year went by and we did it a third
18 time, and each time the conclusions were more or less the
19 same. The exact number changed a little bit but not much.
20 In fact, the need seemed to grow, and each time I went to
21 all the stations; in fact, I've been to all the stations
22 five times, every one of them. I've walked around each one.
23 And now there's 25 stations, or at least in October, when I
24 did this for the third time, the number of stations had
25 declined from 27 to 25. Why is that? Well, from what I

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1 could see, the intersection at Georgia Avenue and Randolph
2 Road, I believe it's Randolph, is under some major
3 reconstruction and the State Department of Transportation,
4 as I understand it, took out two stations. One of them was
5 on the verge of closing anyway before this happened, but
6 they were certainly glad to be purchased.

7 MR. GROSSMAN: Do we know why they were on the, on
8 the cusp of closing?
9 THE WITNESS: You know, I, based on my
10 observation --
11 MS. ROSENFELD: I'm going to object, hearsay.
12 MR. GOECKE: Hearsay is admissible in these
13 proceedings. They've argued that before in these hearings.
14 MR. GROSSMAN: Well, first of all, he said based
15 on -- he started to say based on his observation. How do
16 you conclude hearsay there? So go ahead. I'll --
17 THE WITNESS: Yes, sir.
18 MR. GROSSMAN: -- overrule the objection. Go
19 ahead.
20 THE WITNESS: First of all, it was an old station
21 that had only four pumps. It was not well maintained.
22 There were abandoned cars, or at least cars that seemed to
23 have been abandoned, on the property. They were more,
24 operating more on the cigarette and lottery side of the
25 business. They had no maintenance facility. It was not a,

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1 from my observation, it was not an up-to-date,
2 business-minded kind of a station and that was the one that
3 closed first.

4 MR. GROSSMAN: Okay.
5 THE WITNESS: The second one was closed because it
6 was part of the intersection improvements.
7 MR. GROSSMAN: All right.
8 THE WITNESS: Let's see. So over the course of
9 this work, I looked at all of the 27 and then the 25
10 stations five different times. At the beginning there was a
11 significant gap. It grew somewhat. Not only did the number
12 of stations decline in this period of time but the
13 population and the income and therefore the demand for
14 gasoline had increased. So by the time of the last report
15 that I did on this same subject, which was October 2012, the
16 demand was -- let me just find it here.
17 MS. HARRIS: Mr. Grossman, Mr. Flynn is referring
18 to Exhibit 14.
19 MR. GROSSMAN: Okay.
20 THE WITNESS: Excuse me?
21 BY MS. HARRIS:
22 Q You're referring to Exhibit 14, which is your --
23 A Oh, sorry, yes.
24 Q -- November 2012 report.
25 A Yes. The demand was a \$71 million kind of gap,

1 but it represented a potential sale of about 13 million
2 gallons of gasoline a year. So that was my approach, my
3 methodology.

4 I did the same analysis again, or a similar one,
5 based on a request from Costco that I look, not at this
6 general neighborhood, but at a more specific area, what I
7 call the limited neighborhood. That limited neighborhood is
8 shown here in this photograph, and the lines are shown
9 around it, and it's basically Wheaton Plaza and a small part
10 of the neighborhood that borders it. I believe this area
11 was defined by the staff of the Maryland-National Capital
12 Park and Planning Commission. That staff defined this,
13 and -- what we call now the limited neighborhood -- and I
14 was asked, Costco asked me to do an analysis: what would be
15 the demand in this limited neighborhood; if you only looked
16 at the limited neighborhood, how much gasoline would be,
17 would there be a need for, and that was a whole different
18 type of analysis but very interesting.

19 I found that there were four parts to this, to the
20 demand within this limited area. The first one was the
21 traffic going by, people stopping in. This is how gasoline
22 is very often sold. It's the pass-by traffic. Recognizing
23 that all these people have to be customers, have to be
24 members of Costco, we still estimated that the sale to
25 pass-by traffic -- this is Georgia Avenue, University

1 Boulevard, and Veirs Mill Road -- would be -- and this,
2 these conclusions are presented in my memo of July 1st -- I
3 estimated the sale of --

4 MR. GROSSMAN: Do you have the exhibit number on
5 that?

6 THE WITNESS: July 1st, 2013.

7 BY MS. HARRIS:

8 Q Yes. Hold on one moment.

9 MS. HARRIS: 198, I believe.

10 MR. GROSSMAN: Yes. I think that's the one I
11 mentioned this morning.

12 MS. HARRIS: Yes.

13 MR. GROSSMAN: Okay.

14 THE WITNESS: I estimated that the sale of
15 gasoline, pass-by traffic, would be about 4.4 million
16 gallons a year, a very significant number, because the
17 station was very convenient to people passing by. You do
18 have to go inside the mall. That's not bad. That's still
19 convenient if you happen to be passing on that street or
20 that street. There's a ring road. It's pretty easy to get
21 in there.

22 So in that second analysis of the limited
23 neighborhood, the first source was this source of pass-by
24 traffic. Now, in the, in Park and Planning's sector plan
25 for this area, they call on this a hub, a crossroads, excuse

1 me, a crossroads of Montgomery County, and it certainly is,
2 judging by the amount of traffic going by this site. It's a
3 very significant site and that's why there's probably about,
4 I believe, six gas stations around here, because it is a
5 crossroads of Montgomery County.

6 The second source in this limited neighborhood was
7 of people working on the site. The mall itself has, and the
8 buildings around it, which are not technically part of the
9 mall, they're outparcels, individually operated by health
10 clubs and by Giant or, yeah, I guess it's Giant Foods and by
11 other entities that use land of the mall, that the demand
12 from the workers at the site, assuming that -- and I had to
13 make an assumption here -- assuming that a portion of those
14 workers would buy gas since they would be members of Costco,
15 likely to be members, they would already be at the site,
16 this is their workplace, this is a very easy, a safe,
17 convenient, an economical way for them to purchase gas, that
18 the sale to these workers would be 246,000 gallons a year.
19 This is a relatively small number, but it's still important.
20 So we have the sale to the pass-by traffic, the sale to the
21 workers.

22 The third source of demand would be, in this
23 limited neighborhood, would be to the people who are
24 shopping on the site, and this place generates a lot of
25 shopping, and this is really the big, the big source of

1 potential demand. This includes the people shopping not
2 only at Costco -- well, since Costco's already open, we know
3 now how many people shop there, about 4,000, over 4,000
4 people a day, very significant, not individuals, but
5 households that might include parties of two and three or
6 more -- also the shoppers, including people who go to the
7 mall, the other parts of the mall, and the people who go to
8 the health club and the people who go to the cinemas. So
9 this was a very significant source of demand, and these
10 sources, shoppers already in this neighborhood, this was 6.4
11 million gallons per year.

12 So, again, staying with this limited neighborhood,
13 only one more piece and that's the people who live in this
14 area right here, and some of these people are going to be
15 Costco members, I believe, and are going to buy gas at
16 Costco since it's so close. I think they will. And that's
17 a very small number, but we wanted to be sure to be
18 inclusive; so we added that in. And the summary of all this
19 indicates that in this limited neighborhood we could
20 estimate a potential need for 11.1 million gallons of
21 gasoline per year selling to Costco members.

22 MR. GROSSMAN: I didn't hear the figure for the
23 portion that would be local residents.

24 THE WITNESS: Yes, sir. That portion was 29,025
25 gallons per year.

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1 MR. GROSSMAN: Twenty-nine thousand?
2 THE WITNESS: Two nine zero two five.
3 MR. GROSSMAN: Zero two five? Okay.
4 BY MS. HARRIS:
5 Q What percentage of the residents did you assume
6 were Costco members in making that determination?
7 A Our standard assumption on that is, I believe, 25,
8 23 percent, 25 percent.
9 Q Okay. And are there any gas stations within that
10 limited area delineation?
11 A No, there are not. There are no gas stations in
12 that limited neighborhood.
13 Q You identified some sources that you looked at in
14 conducting your evaluation. Can you identify, were there
15 any other sources that you used in doing your evaluation?
16 A Yes. Before I say --
17 Q Okay.
18 A -- comment, I just want to recap something.
19 Q Certainly.
20 A So I did this analysis four times. Three times I
21 did it for the general neighborhood, which I understood to
22 be on a term that the court accepted, that I had used here
23 before and that the Park and Planning Commission staff used,
24 more or less, this drive time, and then the fourth time I
25 did it for this limited neighborhood, but they're very

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1 different definitions, and in all four cases, it's
2 essentially the same. And not only did I look at the, at
3 the fact that there was a need, but I looked at the reasons
4 why there was a need, and in every one of these analyses, I
5 went to every station and checked the prices, and for every
6 time that I went, the Costco price at the nearest Costco
7 station was lower than any of the prices at any of the other
8 stations in this entire area, that is, the 27 at first or
9 the 25.
10 Now that I, let me -- back to your question now.
11 Q Yes.
12 A I did use other sources. I had to look at
13 national energy use figures to understand trends in the
14 future. I reviewed the latest -- and Park and Planning
15 staff agreed with me -- but these were the latest analyses
16 of energy uses and trends out to 2035. I also looked at
17 trends in the gasoline sales industry to understand why
18 there were fewer stations, why are so many stations closing.
19 With or without Costco, there's a huge national trend toward
20 the closing of stations. So I looked at that data. I
21 looked at online sources about Costco prices and gas prices
22 in general, and there are many of those. There are, there
23 are sources out there that will instantly make these
24 comparisons, and they confirmed what I had seen by going to
25 every station. So I did use other sources that supplemented

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1 and seemed to confirm what I concluded here.
2 Q Thank you. And you noted that you had gone to the
3 numerous stations several times. Have you personally
4 visited the subject site as well?
5 A Yes, I have. I've been there quite a few times,
6 probably 20 times, not in every case because of the Costco
7 situation but because I shopped there at one time and lived
8 in that neighborhood.
9 Q Okay. And for any reason, within the
10 seven-minute-drive delineation, did you exclude any gas
11 stations from your analysis?
12 A No.
13 Q Did you conduct surveys of shoppers with respect
14 to your research?
15 A Yes. I, if I can expand on that a little bit --
16 Q Yes, if you could.
17 A -- the last time that I was in this court,
18 Mr. Grossman asked me if I had talked to people who were
19 actually shopping at places we were talking about. This had
20 to do with one of the Wendy's. I had to admit that I had
21 not. I had done my research in a very academic way. I
22 don't even have to go outside my house sometimes. In this
23 case, I went to every site and I also structured two
24 interactive discussions with people at different locations.
25 The first one was with Costco shoppers. I wanted to

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1 understand whether people who were buying things out of
2 Costco were going to purchase gas.
3 So I went over to the Costco in Greenbelt, which
4 is off Route 1, and I spent a half a day there, and I talked
5 with 35 individuals randomly passing through Costco's
6 service line, and I asked them various questions. I did not
7 tell them why I was asking about this, and my survey is
8 included in my report. I asked them where they, what their
9 ZIP code was, and my primary interest, I asked them whether
10 they had come to shop for gas only or whether they had been
11 shopping at the warehouse and then had purchased gas. It
12 was quite surprising to me that a majority of these
13 people -- there were about 25 or so, I believe -- came from
14 the Silver Spring area. They were driving quite a distance,
15 it seemed to me, 15 or 20 minutes to get there, and a large
16 number of them had combined their trip to the gas station
17 with the trip to the warehouse. They were shopping and they
18 bought gas on their way out.
19 MR. GROSSMAN: The Costco warehouse, you mean?
20 THE WITNESS: Yes, sir --
21 MR. GROSSMAN: Okay.
22 THE WITNESS: -- the Costco warehouse. And their
23 number one reason for buying gasoline at Costco was it was
24 convenient for them on this trip. Their second reason was
25 it was the cheapest gas around, and I could verify that

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1 because within walking distance of the Costco warehouse in
2 Greenbelt, there are -- at the time, there were six
3 stations; now there are more, there are seven or eight, and
4 all of them were less, were more expensive than the Costco
5 gas product.
6 So that was the first survey set that I did.
7 Granted, it wasn't a Gallup poll. I don't have the
8 resources to interview thousands of people. I simply took
9 people on a random basis and asked them sensible question --
10 what were they doing there, where did they live, what was
11 the reason they were there.
12 The second survey instrument -- again, just to
13 respond to the need to understand how people were acting --
14 was in Silver Spring itself. I went to five, four or five
15 stations around the Wheaton Mall, and there are, as I said,
16 there's at least a half a dozen. I was at the Freestate,
17 for example. I went to the Exxon at Georgia and
18 University --
19 MR. GROSSMAN: They're not, I take it from your
20 earlier testimony, none of these stations is actually in
21 the, what you call the limited neighborhood, is that
22 correct?
23 THE WITNESS: That's correct.
24 MR. GROSSMAN: Okay.
25 THE WITNESS: Yes, sir. I'll point that out on

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1 the, on the aerial photo up here. The station at -- the
2 Freestate station is here on --
3 MR. GROSSMAN: I see it.
4 THE WITNESS: -- Veirs Mill Road. It's about a
5 half a mile or maybe a quarter of a mile.
6 MR. GROSSMAN: Is this an exhibit, a marked
7 exhibit, by the way?
8 MS. HARRIS: Yes. It's 159, I believe.
9 MR. GROSSMAN: Okay, right.
10 MS. HARRIS: Yes.
11 MR. GROSSMAN: All right, thank you.
12 THE WITNESS: That's the Freestate station.
13 MR. GROSSMAN: So that's almost due north of the
14 point on the --
15 THE WITNESS: Yes, sir.
16 MR. GROSSMAN: -- on the limited, what you call
17 limited neighborhood.
18 THE WITNESS: Yes. It's a very busy station in
19 the middle of this residential area. It's packed in there.
20 There's also a Sunoco station almost right next to it --
21 MR. GROSSMAN: Okay.
22 THE WITNESS: -- I stopped there too, and I also
23 went to the Exxon station, which is on the corner of Georgia
24 Avenue and University.
25 MR. GROSSMAN: Okay. That's to the northeast of

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1 the site.
2 THE WITNESS: Northeast. And then there's a
3 Texaco station on, excuse me, Texaco -- Shell. It's a
4 little farther north on Georgia.
5 MR. GROSSMAN: Okay.
6 THE WITNESS: I asked people, recognizing that
7 this is a hypothetical, I asked them that if there were a
8 nearby Costco station, would they purchase gas there. I had
9 to do this in the context of a give-and-take a little bit.
10 So this, again, is not of the Gallup/Pew Research level. It
11 is simply a straightforward kind of discussion because
12 people had to say, well, I'd have to be a member, and I
13 would have to say, yes, you have to be a member; how much is
14 that, that's \$50 at the time or whatever. There had to be a
15 little conversation, but I did feel very confident that I
16 could say that the majority of people would buy gas and told
17 me they would purchase the cheapest gas; for example, that
18 was why they were at the Freestate, because that gas was a
19 few pennies less than other stations. That doesn't mean
20 that there weren't people at other stations, because not
21 everybody is motivated by the cheapest gas and, in some
22 cases, people who are, don't have the, don't have enough of
23 an incentive to travel a few blocks off their path. But, in
24 general, my sense from talking with, again, about 25 people
25 at these stations was -- and I acknowledge the limitations

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1 of that -- but my sense, clearly, as analyst of this from a
2 needs and economic perspective, was that people really did
3 want cheaper gas. They were in favor of that and that
4 showed through in their responses to me.
5 BY MS. HARRIS:
6 Q Thank you. What, if any, assumptions did you make
7 in the course of your analysis?
8 A In this analysis there were, there was a series of
9 assumptions, all of which, I believe, are identified in my
10 reports. Pretty much, the report that I did three times is
11 essentially similar in each case. The fourth report is
12 different. The one on the limited neighborhood is a little
13 different. I've identified those reports and I've
14 identified the assumptions. In this kind of work, it is
15 essential, it is -- one has to make some assumptions.
16 There's no way around it. No one in my business can not do
17 that. You just have to acknowledge them and try to clarify
18 why they are what they are, and I've done that in all of
19 this work.
20 I would say that I never assumed any figures that
21 Costco gave me were correct. I never used any figures. I
22 didn't know, until I completed most of this work, that they
23 thought that I was in the ballpark of what they were going
24 to evaluate, or what they were going to expect in terms of
25 sale, and I never asked them anything about their customers

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1 or, other than what, how many customers they thought they
2 had in this area and how many business customers, but as to
3 the demographics of their customers, I have no knowledge.
4 So I made assumptions, but I think they were
5 limited, they were reasonable, and they're ones that I
6 professionally defend.
7 Q You touched on this, but I want you to elaborate
8 on the findings with respect to the general neighborhood.
9 A Yes. The findings with respect to the general
10 neighborhood, there's really similar components in the
11 general neighborhood. It's interesting that the, the
12 residential base is much greater. This is over 100,000
13 people living within a seven-minute drive of this mall.
14 That's why it's a, one of the reasons it's a successful
15 mall, is there is such a concentration of population. It is
16 also a high-income population. I don't know, I can't recall
17 the average household income in this neighborhood, but it's
18 way above anywhere else I work. It's higher than the
19 national figure. This is Montgomery County. This is the,
20 you know, the big leagues of retailing here, and that
21 population, it's very mixed population and very ethnically
22 diverse, very well educated, very mobile, the average person
23 drives 30 minutes to work, something like 30 minutes,
24 incredible drive time for commuting. So that's one
25 component, this residential component.

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1 The other components are people passing through;
2 they're tourists. They live up on a northern part of the
3 County, or they might live -- this is a hub, a crossroads of
4 Montgomery County -- they might live over in Greenbelt or in
5 Laurel; they might be passing through. They might live in,
6 here in Rockville and coming down 27. There's all kinds of
7 movements for this site.
8 So there's the residence, there's the traffic --
9 traffic is extremely important in what I do -- and then
10 there's the people who work in the area, and those are the
11 workers at the mall and the workers in the Wheaton area. It
12 is a central business district, so a very significant worker
13 population. There's a small number of tourists, although I,
14 I don't know what they would be doing there.
15 So these four groups are similar to what we
16 captured in the, in the limited neighborhood except that
17 they all converge in the limited neighborhood. They've got
18 to come here anyway. They're coming here to shop. They're
19 going to the health club. They're going to the movies.
20 They're going -- they're at this mall for various reasons
21 and, oh, there's a Costco and I'm a member and I need gas
22 and this is the cheapest gas and it's not only cheap but
23 it's a safe station, I don't have to worry about being out
24 on the, out at the corner of University in the middle of the
25 night without anybody around, buying gas; this is a

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1 protected area. So it's convenient and cheap and safe. So
2 the general neighborhood captures this on-site traffic, and
3 as I said, it's -- the result that we got here was 85
4 percent of the result that we got there.
5 Q Thank you.
6 MR. GROSSMAN: And for the record, the here and
7 there, the result you got here, meaning what you call the
8 limited neighborhood --
9 THE WITNESS: Yes, sir.
10 MR. GROSSMAN: -- the 85 percent are the results
11 you got in your calculation, your original calculation of
12 what you called the general neighborhood.
13 THE WITNESS: Correct. Yes, sir.
14 BY MS. HARRIS:
15 Q So, in your opinion, is a need established to
16 serve the population in the limited and the general
17 neighborhood?
18 A Yes, it is.
19 Q And that need, can you elaborate on what that need
20 is or how the consumer defines that need?
21 A Yes. I think it's, it's easy to point out that
22 there are lots of gas stations and lots of places to get
23 gas. Well, if there are, then what is this need? The fact
24 is that people are traveling distances, great distances,
25 because what's there is not satisfying their need. What's

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1 in the Wheaton area, the Freestate or the other stations,
2 are not fulfilling this need. The need is evident in the
3 numbers.
4 So I would say that the need, which I, I first
5 realized when I was over in Greenbelt interviewing people
6 who came from Silver Spring, validated the numbers that
7 Nielsen Claritas was showing me that seemed to represent an
8 opportunity. This, this opportunity from a, from a
9 market/analytical point of view was also a need from the
10 point of view of the community, and whether you defined it
11 as the general neighborhood, which I thought I did in
12 accordance with the ordinance, or as the limited
13 neighborhood, which the staff defined in the other way,
14 there was -- this need was still present.
15 Q In your analysis you determined in talking to
16 people that price was a big determinant. Were there any
17 other determinants?
18 A Yes. After spending now four years on this, I've
19 concluded that price is just one aspect of what makes Costco
20 a successful gasoline retailer. The other two issues are
21 safety and convenience. Those are the top three things, and
22 if they have a mantra about selling gas, that's what it
23 consists of -- price, safety, and convenience -- and those
24 are the things that make up need.
25 Q Costco claims to have the lowest price of all the

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1 stations in the area. How did you determine that, and I
2 think you already touched on why that's important, but if
3 you have anything to elaborate, that'll be helpful.
4 A Yes. Well, as I said, I went to every station, to
5 27 and then to 25, five different times. I personally went,
6 all on the same day, all within two hours of doing this, I
7 went and looked at the prices on the, on the signs. I
8 didn't ask. I didn't, I didn't go to the Web. I went to
9 the stations, and in some cases, I bought gas; and in every
10 case the Costco's price was the less, least of all of the
11 other 25 or 27. It was always the least.
12 Now, one could say, well, that's the Costco in
13 Greenbelt, what does that have to do with us? I had to use
14 some reference point, and I believe that the Costco station
15 and price in Greenbelt is probably going to be very close to
16 the one in Silver Spring, if there ever is a station there,
17 and so I used that. And I recognize it's not perfect,
18 because I didn't have any other price to use, but every time
19 I did it it was always the lowest price. So I was always
20 surprised when people would say, well, it's not the lowest,
21 it's something else, and you got to be a member and all
22 this. It's the lowest price. I kept seeing that, and the
23 numbers, I put them in all these reports, the numbers are
24 clear: this is the lowest price.
25 Now, I did hear somebody say, well, I belong to, I

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1 go to Giant, I shop at Giant and, or at Safeway, and I can
2 get some kind of discount by purchasing a lot of groceries,
3 and I always think from a market perspective -- I know I
4 would never say it -- but don't you think you pay a little
5 more for that, I think you do. Now, maybe it's not much
6 more, it's pennies, it's fractional. I also noticed that
7 there are very few places in this area where you can use
8 those credits. There are very few participating Shell
9 stations with respect to Safeway, if any. The last time I
10 checked there were none. There might be one or two now, I
11 don't know. It's very hard to use that. Most of those
12 advantages disappear because people don't use them or they
13 don't understand how to use them. I personally spent a year
14 before I used any, any Giant credits -- I shop at Giant all
15 the time -- because I didn't understand what they were
16 telling me. They don't broadcast that, they don't market it
17 effectively, it's not clear on the sign, and most consumers
18 in my opinion do not know what that advantage is, and
19 ultimately it's not an advantage.
20 So in every case that I looked at, it was always
21 the cheapest price, and it's been proven again and again
22 that people are highly motivated. By my calculation, most
23 recently, based on average sale price of Costco gas versus
24 the average of the other stations, a household, based on
25 average use, can save almost \$300 a year. Now, that's not

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1 significant to everybody, but it sure is a motivating factor
2 to a lot of people. \$300 a year, if you're balancing your
3 family budget, is a big number. I think we, most of us
4 would feel that way.
5 So price was in every case very, the most
6 important, but there was also safety and convenience. I can
7 speak about those or perhaps we want to hold off on that.
8 Q Yes, I'll get to that in a bit. I want to ask
9 another question related to the consumption. You indicated
10 that there's 10 to 12 million gallons a year anticipated to
11 be sold at the, at the subject site, but I just want to
12 clarify, in your opinion, is the consumption of the 10 to 12
13 million gallons anticipated to be sold at the subject site,
14 does it need to come from the people either within the
15 limited neighborhood or the general neighborhood --
16 A Well, not --
17 Q -- in order to establish the need question?
18 A Actually, in reality, I was trying to follow this
19 idea of a seven-minute boundary or of a general, a limited
20 neighborhood defined there. The truth is that from a market
21 perspective Costco draws from 15 to 20 minutes away. This
22 is a fact of life in the business. Their market area in
23 Greenbelt includes Silver Spring. That'll change now if --
24 now that this other place is open, but people will come from
25 outside that seven-minute drive, no matter which definition

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1 you use, whether it's the limited or the general.
2 Q And then based on your analysis of other needs
3 cases, the amount of, the amount that was determined to be
4 sold at a given gas station or fast-food restaurant, in
5 those cases, did not need to be purchased by the people
6 within the general neighborhood, is that correct?
7 A I'm sorry. I'm not following that, Pat.
8 Q Based on your experience on other cases where
9 needs was a determining, a required factor, was it
10 determined that the need, that the amount of good that was
11 to be sold did not need to be consumed only by the people
12 within the general neighborhood, as defined?
13 MR. SILVERMAN: Objection.
14 THE WITNESS: I don't think there is any control
15 over it --
16 MR. GROSSMAN: Well, hold on one second. There's
17 an objection.
18 MR. SILVERMAN: Objection. She's calling for a
19 legal conclusion.
20 MR. GROSSMAN: She said, did not need to be
21 consumed by the people. Why do you feel that's a legal
22 conclusion?
23 MR. SILVERMAN: I thought she was asking an
24 interpretation of the law based on his --
25 MR. GROSSMAN: Can you repeat your question,

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1 Ms. Harris, so I can focus in on it?
2 MS. HARRIS: As convoluted as it was.
3 MR. SILVERMAN: It's kind of important.
4 BY MS. HARRIS:
5 Q Based on the other cases that you've worked on
6 where need was a requirement, was your conclusion that the
7 amount of good that was to be sold, did it all need to be
8 consumed or sold to people that reside within the general
9 neighborhood?
10 A I would say --
11 MR. GROSSMAN: No. Hold on one second. Now,
12 let's -- your objection is whether or not she's calling for
13 a definition of what need is because the question asked
14 whether or not it had to be consumed within the general
15 neighborhood?
16 MR. SILVERMAN: Yes. She's asking you to
17 interpret -- she's asking him to do an interpretation, which
18 I guess you'll do.
19 MR. GROSSMAN: There is an aspect of that in that
20 question. I understand your objection, but let's hear his
21 answer. I'm going to overrule the objection and hear what
22 his answer is from, based on other needs cases that he has
23 worked only and where the, where the definition has been
24 accepted. I should preface it by saying that there is an
25 issue raised in this case by Ms. Rosenfeld, by Ms. Cordry, I

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1 believe it was, a significant issue, as to what is the
2 general neighborhood for purposes of this needs analysis, in
3 that general neighborhood is defined ordinarily in these
4 kinds of cases as the area that's most affected by the
5 proposed special exception within sight and sound and maybe
6 within traffic impact. That's how general neighborhood was
7 defined by the technical staff here; that what you called
8 the limited neighborhood, they called the general
9 neighborhood as their definition.
10 Then the question came up in the section that you
11 are applying, that is, the one that pertains to needs
12 analysis, whether or not the use of the term general
13 neighborhood there is the same as the general neighborhood
14 which is defined. The zoning ordinance does not make that
15 clear, doesn't define it, and so that's an issue in this
16 case, which is why you were asked to do a second analysis by
17 the applicant, treating that, what you called the limited
18 neighborhood, as the general neighborhood to determine
19 whether or not there is need in that more limited area.
20 So I guess the question that is being raised now
21 by Ms. Harris is whether or not -- where you get your
22 conclusion as to what, how you apply the term general
23 neighborhood. I guess that's --
24 MS. HARRIS: No, that --
25 MR. GROSSMAN: -- really what you're getting to.

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1 You didn't, that's not exactly what you asked, but --
2 MS. HARRIS: I think my question is more --
3 MR. GROSSMAN: You said whether it's to be
4 consumed within the area.
5 MS. HARRIS: In order to establish need --
6 MR. GROSSMAN: Yes. Mean I gave that long preface
7 for no good reason?
8 MS. HARRIS: No, but I was with you up until you
9 summarized my question.
10 MR. GROSSMAN: All right.
11 BY MS. HARRIS:
12 Q Can need be established based on -- let me ask,
13 I'll break it down. Can need, in your opinion, can need be
14 established based on the limited neighborhood, as defined?
15 A Yes.
16 Q And can need be established based on the general
17 neighborhood, as defined?
18 A Yes.
19 Q Having said that, is it likely that additional gas
20 will be sold to people outside either the limited
21 neighborhood or the general neighborhood?
22 A I believe so, yes.
23 Q That was -- thank you.
24 MR. GROSSMAN: Okay.
25 MS. HARRIS: Yes.

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1 MR. SILVERMAN: Those were good and different
2 questions.
3 BY MS. HARRIS:
4 Q You mentioned that you relied upon the Claritas
5 Nielsen data. Have --
6 A Yes.
7 Q -- you used that in other Montgomery County
8 evaluations?
9 A Yes, I have. I've used it in all of the work that
10 I've done here and many other places as well.
11 Q And just for the record, can you make sure you, or
12 could you please spell Claritas?
13 A C-L-A-R-I-T-A-S.
14 Q And Board of Appeals has accepted the Claritas
15 data, is that correct?
16 A Yes, it has.
17 Q And I'd like for you to just expand a little bit
18 on that data and how you utilized it for this stuff.
19 A Yes. I work a lot with this data, and in fact, in
20 the years that I've been working on this project, this
21 company, Claritas -- which was formed, founded by two
22 Cornell professors who are now living on an island they own
23 in Hawaii somewhere -- those, that company has changed hands
24 two or three times. It remains the same company. It's a
25 very, very big data provider, and it's used throughout the

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1 development industry by entities. I don't know if Costco
2 uses it, but I know that many other retailers use it and
3 many other businesses that are trying to make site
4 decisions. It still has a high-degree, even though it's
5 been transformed by various corporate purchases and they've
6 tried to merge it with other kinds of data and uses to make
7 more money, it still has a very solid foundation.
8 It enables me in different situations to choose a
9 seven-minute drive time or a five-minute drive time or any
10 number of minute drive time up to, I think, an hour, or I
11 can choose to do what they call draw a polygram, which means
12 I can make a shape around the place based on features of the
13 natural area or any features I can imagine, or I can define
14 a jurisdiction. I could have said Silver Spring or
15 Montgomery County, which I did, but I didn't -- I'm not
16 reporting that because I didn't think it was relevant. I
17 can form the market or the area that I want to analyze based
18 on almost any way that I choose. Using the general
19 neighborhood idea and my experience in this court in the
20 past, I felt that seven minutes was reasonable, and Claritas
21 has a way of breaking down population and income and
22 economic figures into areas that we select and that's how I
23 used it in this case.
24 I talk with them at a staff level -- they have
25 offices all around the country, but their staff is somewhere

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1 in California, their technical staff -- when I have
2 questions or issues. I complain about some things that they
3 do. I applaud them for others. There's a back-and-forth.
4 I don't know if they really hear me, but they act, try and
5 act like they do, and I have seen cases where their numbers
6 are, sometimes seem to be incorrect. That's because I go
7 out and I look at the situation in the field to try and
8 determine that and that's what I did here. I went out and
9 looked, and I felt that their numbers were correct. In most
10 cases, I feel that they're right on.
11 So I've had a relationship with that company. I
12 actually own a license with them which gives me access over
13 a period of a year. I purchase it a year at a time. So I
14 use it, I'm using it on all the other three jobs that I
15 mentioned in my introduction -- New Bern, Spartanburg, and
16 El Paso. So I get to see it a lot, I get to test it a lot,
17 and I'm confident that it's a valid thing. In my -- it is a
18 mathematical model; so it has its limitations. Mathematical
19 models are better when they're used in somewhat larger areas
20 where there's more data, such as the general neighborhood.
21 Q Yes. So in the case of the general neighborhood,
22 you gave them the physical delineation, and then did you
23 tell -- did you ask them for the bottom line, what's gas
24 consumption in this area, or --
25 A There's much more information that I asked them

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1 for, and it's mostly reported in my, in my report.
2 MR. GROSSMAN: Did you give them a delineation, or
3 you just gave them a drive time?
4 THE WITNESS: No, sir, I gave them a drive time.
5 MR. GROSSMAN: That's what I thought.
6 BY MS. HARRIS:
7 Q Okay. And they determined the delineation?
8 A That's correct. There's a table in --
9 MR. GROSSMAN: Because I couldn't imagine why you
10 would draw up that squiggly line like that, because you were
11 submitting it, but it made --
12 THE WITNESS: I'm not --
13 MR. GROSSMAN: -- it made sense from a drive-time
14 perspective.
15 THE WITNESS: You know, Exhibit A-2 in my, in
16 this, not exhibit, yeah, I call it exhibit but that's my
17 term for the table --
18 BY MS. HARRIS:
19 Q This is Exhibit 14, your report.
20 A -- in the back of this exhibit here, my report of
21 October 2012, details their analysis of what are the
22 retail --
23 MR. GROSSMAN: What page are you looking at, sir?
24 THE WITNESS: Oh, this is -- well, this is in the
25 appendix, and it's A-2.

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1 MR. GROSSMAN: Okay.
2 THE WITNESS: And this details in different
3 categories, and depending on the situation I'm working in, I
4 work in different categories. For example, in Spartanburg
5 I'm looking at grocery, and in New Bern, at grocery, and at
6 restaurant-type sales -- for Wendy's I looked at
7 restaurants. So that's the kind of detail that I haven't
8 even spoken about, and the demographics in this area are
9 much more detailed, the kind of thing that, you know, the
10 government seems to come up with but maybe doesn't analyze
11 unless it's in the NSA or something. So it's there as an
12 exhibit in this report.
13 BY MS. HARRIS:
14 Q Thank you. In your opinion, to whom in the
15 general neighborhood or the limited neighborhood would the
16 gas station be reasonably -- to whom would it be reasonably
17 convenient?
18 A Yes. I think that it's the four types of people
19 that we talked about before -- that is, the pass-by
20 travelers, they need gas, they're on their way to work,
21 they're driving half an hour to work; the people who work at
22 the mall, there's several thousand of them who work in these
23 different places there, and they are at work and they need
24 gas; and then the people who are shopping, not only the
25 Costco shoppers, who are huge consumers of this, but the

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1 other shoppers, the Giant and the Target and the other, and
2 the movies; and, finally, the residents, you know, there's a
3 small number in that, in the limited neighborhood and then
4 the much larger number in the general neighborhood.
5 Q Did you take into account the folks that would be
6 parking in the Metro parking garage?
7 A Yes. Those are included in pass-by traffic.
8 They're captured as they drive by into that situation.
9 Q And in your evaluation of all, all of those
10 categories, did you also take into account -- now, obviously
11 not from the Costco shoppers because they're members -- but
12 did you take into account the general percentage of the
13 population that is a Costco member?
14 A Yes, and we used a figure, I believe, of 24
15 percent of households and 92 percent of businesses.
16 Q How, in your opinion, is the station useful to
17 these, to the individuals that you anticipate will buy gas
18 at the Costco station?
19 A Well, I think that it comes back to the three
20 primary reasons that I gave as to the justification for
21 thinking that it will sell this much gasoline. That is, it
22 is the cheapest gas and people want that and it is
23 convenient because they're already, in most cases, already
24 there. I didn't really understand that until I did this
25 second analysis of the limited neighborhood. They're

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1 already there. And, thirdly -- and this was rather striking
2 to me because I had been to every other station -- it's a
3 safer version of, a safer way to get gas.
4 I noticed -- and I had not realized this at
5 first -- I noticed that Costco has a way to wash your eyes,
6 you know. If you saw the movie Long Way Round about a guy
7 who travels through Siberia on a motorcycle, you'll see what
8 can happen if you spill gasoline in your eyes. You need
9 immediate attention, and I don't think other stations
10 typically, or perhaps at all, have that. They have an
11 eyewash station. Not everyone realizes that, but it's
12 important.
13 I also noted -- and this is with respect to that
14 third issue of safety -- I was at stations where there was
15 no one who could help me if something, if I was robbed, you
16 know, at night. There are people behind bulletproof booths.
17 Costco customers know there's somebody there. So -- and for
18 other reasons, too, it's safer.
19 And then I noticed things about their operating
20 pattern, that they have one-way traffic flows. Oh, well, so
21 what? You know, it doesn't really matter. Well, I've
22 noticed so many near accidents. I haven't had one, but I've
23 noticed that when you move through a Wawa, for example,
24 which has 16 fueling stations and you can move at opposite
25 directions to the other people in those stations, the

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1 potential for accidents is much greater. There's a lot more
2 movement of people in and around pumps; it's a different
3 environment. So cost, convenience, and safety were the
4 things that made the case to me that these numbers were
5 correct.
6 Q So those are the factors, in your opinion, that
7 would influence why someone would go to a Costco and not
8 another station, is that correct?
9 A Yes.
10 Q And are there other factors that play into someone
11 deciding not to go to the Costco station and perhaps going
12 to one of the other stations?
13 A Yes, there are. Some stations have service, and
14 you know, you got to take your hat off to the people who can
15 provide service in this economy; it's not an easy thing to
16 do. Cars are much more sophisticated; most people are going
17 to dealers. That's one of the reasons stations are closing:
18 they can't trust the man at the gas station the way you used
19 to; however, some people still like being able to drop off
20 the car. There are also some stations with true C stores,
21 that is, convenience stores, such as the Mobile station on
22 University that has a doughnut shop in it, and then there's
23 some people who simply want to have a family-owned or a
24 small service station. There's some people who still want
25 that. So -- and there's probably other reasons, but

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1 there -- and among those three categories that I can think
2 of, I think there's still quite a few people.
3 Q And, in your opinion, is the Costco station
4 different than any of the other stations in the general
5 neighborhood?
6 A Absolutely. It's completely different. It's
7 unique. It's one of a kind. There is no other station that
8 has the kind of safety features that it offers. The
9 physical safety, the environmental safety, the attendance,
10 the convenience, no other station offers that.
11 Q And then one final question, which is, how do you
12 reconcile that on the one hand the opponents are alleging
13 that there's no need for the gas station and then on the
14 other hand we've heard that there's going to be long queues
15 constantly at the gas station?
16 A Yes. I think there's a, sometimes a confusion
17 about capacity and real need, and that is, you know, on --
18 there's plenty of stations that people are not going to.
19 There's a lot of capacity in the general neighborhood.
20 There's still 25 stations that have the capacity to pump
21 hundreds of millions of gallons of gas. People don't care.
22 They go where they want to go. They demonstrate their need
23 by their feet, or their wheels in this case, and they go to
24 the Costco station even though it's 20 to, 15 to 20 minutes
25 away from them in Greenbelt.

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1 So the idea that there's plenty of capacity is a
2 good theoretical idea; it just doesn't translate. We live
3 in a capitalist society, more or less, where people decide
4 what they think they need. They don't necessarily respond
5 to what I think they need or what the staff thinks they
6 need.
7 Q Thank you.
8 MS. HARRIS: No further questions.
9 MR. GROSSMAN: All right. As I explained, we have
10 this issue about what is the appropriate general
11 neighborhood definition to apply, and you had applied this
12 broader drive-time neighborhood. Is there anything you have
13 relied upon in reaching that, using that definition, in
14 particular? I know you've done it in previous cases. What
15 have you relied on to use that as, in your expert opinion,
16 the general neighborhood that should be defined that way?
17 THE WITNESS: Yes, sir. Besides the previous
18 cases, where we have talked about this and I have raised
19 five-minute, seven-minute and 15-minute drive times, I tend
20 to think more in this case of not -- of the neighborhood,
21 the neighborhood with some boundaries, and it happened that
22 the seven-minute drive was more like the neighborhood. If I
23 were approaching this as purely a market analyst, I would
24 have used a 15 to 20-minute drive. I tried to compress that
25 into a reasonable distance that still had more of the

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1 features of a neighborhood, not that the people seven
2 minutes away feel the physical effects or hear the trucks or
3 smell the fumes of the traffic. It's that that's convenient
4 to them and they feel like, you know, that Wheaton is part
5 of their neighborhood and they're part of that neighborhood.
6 It is -- you could go to eight minutes and say,
7 well, why eight instead of seven or six. I felt -- and I've
8 worked with 7-Elevens and with other kinds of retail chains
9 that sold gas and with gas purveyors, and I've often used
10 this figure, and most of them feel like that's reasonable,
11 and I don't -- it looked like a reasonable figure in this
12 case.
13 MR. GROSSMAN: What's the radius of that drive
14 time?
15 THE WITNESS: The radius -- I did calculate the
16 total area. Let's see. The radius -- I don't have a scale
17 on this, on this figure, sir, but I'm guessing that that's
18 about maybe two miles, roughly.
19 MR. GROSSMAN: Okay.
20 MS. HARRIS: And, actually, if we could mark that
21 as an exhibit, I think that would be helpful, the --
22 MR. GROSSMAN: Okay.
23 THE WITNESS: There might be a scale on the actual
24 document in here. I'll look. No, I'm sorry, there's not.
25 MR. GROSSMAN: Let's mark that as Exhibit, I think

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1 we're up to 217. Exhibit 217, we'll call that map of, I'll
2 say, original general neighborhood for needs analysis.
3 (Exhibit No. 217 was marked
4 for identification.)
5 THE WITNESS: Sir, I didn't calculate the radius,
6 but I do have in that report on page 2-1 a note that this is
7 an area of approximately 15 square miles. I believe that
8 that would mean it was about five miles by three miles, and
9 therefore the radius would be roughly two to two-and-a-half
10 miles.
11 MR. GROSSMAN: Okay.
12 MR. ADELMAN: Pi r squared, so pi --
13 MS. CORDRY: Close enough.
14 MR. GROSSMAN: We're going to have a mathematical
15 decision here.
16 MR. ADELMAN: Square root of five, and so
17 radius --
18 MR. GROSSMAN: Yes.
19 MR. ADELMAN: -- 2.25, something like that,
20 ballpark.
21 MR. GROSSMAN: Okay. So we're right in the
22 ballpark there.
23 MR. ADELMAN: I'm sorry. Was I testifying?
24 MR. GROSSMAN: Pardon me?
25 MR. ADELMAN: Was I testifying?

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1 MR. GROSSMAN: Yes, and now you've finished your
2 testimony, and we're --
3 MR. ADELMAN: Sorry.
4 MR. GROSSMAN: -- we're going to put you up there
5 for cross-examination. All right. All right. So now it's
6 quarter to 4:00. So does anybody wish to begin a
7 cross-examination now? I see a head shaking.
8 MS. CORDRY: Nope, not from the --
9 MR. GROSSMAN: All right. You know, since it's
10 only about an hour and a quarter left for the day, I mean,
11 I'd love to go ahead and complete Mr. Flynn's
12 cross-examination today, but I'm not going to force the
13 issue since it's not that much time left in the day, but you
14 will have to do it tomorrow afternoon if they, you know, if
15 there aren't people that occupy the time. So, Mr. Flynn,
16 can you return to the scene of the crime here tomorrow
17 afternoon?
18 THE WITNESS: I will be here.
19 MR. GROSSMAN: All right. I'm not sure what
20 the -- you'll be in contact with Ms. Harris who will tell
21 you what --
22 THE WITNESS: Yes, I will.
23 MR. GROSSMAN: So you're not required to come back
24 unless you're needed, because we don't know how many people
25 are going to show up, members of the public, to testify

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1 tomorrow.
2 MS. ROSENFELD: And if, by chance, we finish with
3 Mr. Flynn tomorrow afternoon, who would we expect on Friday?
4 MS. HARRIS: Let me go back, and before the end of
5 the day, back to my office and look at my notes, and then
6 I'll e-mail that.
7 MS. ROSENFELD: Okay, thank you.
8 MR. SILVERMAN: I would request, just as a
9 personal matter, that there's no -- it be one of these
10 environment-free days, because I'm afraid I will not be able
11 to be here on Friday. So if that's possible, I'd --
12 MS. HARRIS: Well, ideally, I --
13 MR. SILVERMAN: -- most appreciate it.
14 MS. HARRIS: -- I would have thought it would make
15 sense to pick up with Mr. Sullivan or --
16 MR. GROSSMAN: Well, first of all, how many
17 witnesses do you have left, Ms. Harris?
18 MS. HARRIS: Mr. Cronyn, who is our market real
19 estate evaluation person.
20 MR. GROSSMAN: Okay.
21 MS. HARRIS: Dr. Chase.
22 MR. GROSSMAN: Right.
23 MS. HARRIS: Mark Willard, our landscape
24 architect. We need to bring Dan Duke back. I think, I
25 believe that's it.

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1 MR. GROSSMAN: All right.
2 MR. GOECKE: And then Mr. Sullivan.
3 MS. HARRIS: And we need to complete David,
4 Mr. Sullivan's testimony.
5 MR. GROSSMAN: Okay. So what if we were to --
6 MS. HARRIS: If --
7 MR. GROSSMAN: I was going to suggest, how about
8 the landscape, how about Willard or, or, well, Cronyn or
9 Duke? How about any of those?
10 MS. HARRIS: Well, what I would suggest, because
11 we need to get the revised -- our thought was to get the
12 revised plans in 10 days prior to Dan Duke and Mark Willard
13 testifying.
14 MR. GROSSMAN: Right.
15 MS. HARRIS: So I would think that if he's
16 available, Mr. Cronyn may be the logical person to put on on
17 Friday --
18 MR. GROSSMAN: Okay.
19 MS. HARRIS: -- and as I said, Dr. Chase
20 unfortunately is out of town. So since we haven't
21 provided -- so I can't, I can't put Willard or Duke up
22 because we --
23 MR. GROSSMAN: Right.
24 MS. HARRIS: So it looks like it's going to be
25 Mr. Flynn, Mr. Cronyn, and David Sullivan.

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1 MR. GROSSMAN: Okay.
2 MR. SILVERMAN: Doesn't Mr. Sullivan have to give
3 us all kinds of information?
4 MS. HARRIS: Well --
5 MS. ROSENFELD: I think he's --
6 MR. GROSSMAN: Yes. Hold on. Hold on.
7 MS. ROSENFELD: -- he's updating the noise
8 analysis; he's going to be providing additional data. I
9 really would like him just to provide his information, come
10 back once so that we can just do direct and cross and be
11 finished with him.
12 MR. GROSSMAN: I was going to say something before
13 we, before we finish with the witness discussion, that I was
14 going to set a date, August 9th, because that's 30 days in
15 advance of our final eight days of, beginning of our final
16 eight scheduled days, right, the first one in August, past
17 August, or the first one past August 2nd is September 9th;
18 that that be the final date for any final plans, data,
19 anything else that -- so that, to respond to the concern
20 raised by the opposition here so they don't have to keep
21 switching around. That gives him 30 days to analyze
22 everything. No further changes will be accepted --
23 MS. HARRIS: That's --
24 MR. GROSSMAN: -- absent a darn good show and a
25 good cause, say.

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1 MS. HARRIS: I think that's, that's fine.
2 MR. GROSSMAN: So --
3 MS. HARRIS: Yes.
4 MR. GROSSMAN: Is that fair all the way around?
5 MS. HARRIS: Absolutely.
6 MR. GROSSMAN: Okay.
7 MS. ROSENFELD: Yes, thank you.
8 MR. GROSSMAN: Okay.
9 MS. HARRIS: Now --
10 MR. GROSSMAN: And I guess I ought to mention that
11 for tomorrow's session, I understand that the tree next to
12 my house is being taken down; so my electricity is going to
13 be turned off, and my street is going to be blocked off.
14 Hopefully that won't be before I leave in the morning or
15 else Mr. Silverman may have to take over for me and conduct
16 the hearing.
17 MS. HARRIS: Or you can spend the night at
18 Mr. Silverman's house.
19 MR. GROSSMAN: In any event, I don't anticipate a
20 problem, because they tell me that they won't start before
21 8:30, but just letting you know. Okay.
22 MS. HARRIS: So if we could look at the schedule
23 just for one moment. If we assume for a moment that
24 Mr. Flynn could get on tomorrow afternoon, then it looks
25 like on Friday the only person that we could put on is

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1 Mr. Cronyn. So I don't know if the, so the -- so I'm not
2 sure what we do with that.
3 MR. GROSSMAN: Dan Duke was going to come back as
4 far as? You have to refresh my recollection. Why did we
5 have Mr. Duke --
6 MS. HARRIS: Because of the ultimate revised plan
7 dealing with the pedestrian path and the bollards. He needs
8 to testify to that.
9 MR. GROSSMAN: Okay. Is there any question -- in
10 terms of the modification to the plan, as far as the
11 bollards and the moving of the tanks, is that a done deal
12 now --
13 MS. HARRIS: Yes.
14 MR. GROSSMAN: -- that part of it?
15 MS. HARRIS: Yes.
16 MR. GROSSMAN: All right. So there's no question
17 about that. So the only -- so the question is, does
18 Mr. Duke really deal with the pedestrian path issue?
19 MS. HARRIS: Well, I think he --
20 MR. GROSSMAN: Ms. Rosenfeld, you're shaking your
21 head yes; so verbalize that.
22 MS. ROSENFELD: From my point of view, absolutely,
23 yes.
24 MR. GROSSMAN: All right. Why is his engineering
25 opinion relevant on the --

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1 MS. ROSENFELD: Because he's the one who testifies
2 as to dimensions and scale and he has information about
3 truck-turning radii and I understand that's his area of
4 expertise. Mr. Guckert made it clear it was not his. What
5 I might suggest is that if we finish tomorrow, perhaps
6 Mr. Cronyn can even begin tomorrow. I don't think that
7 Mr. Flynn or Mr. Cronyn, either one, are going to be
8 exceptionally long witnesses, and it's --
9 MR. GROSSMAN: Right.
10 MS. ROSENFELD: -- possible, if public testimony
11 tomorrow is not as lengthy as we first anticipated, we might
12 be able to finish both witnesses tomorrow.
13 MR. GROSSMAN: Right. And then what do we do on
14 August 2nd?
15 MS. ROSENFELD: We can all take a day off.
16 MS. HARRIS: I mean, could the opponents start
17 their case, or does that get too confusing since we have two
18 more --
19 MS. CORDRY: No. No.
20 MR. GROSSMAN: No, that --
21 MS. HARRIS: -- a couple witnesses to put on?
22 MS. CORDRY: Not before Mr. Sullivan comes back
23 and finishes.
24 MS. ROSENFELD: No.
25 MS. CORDRY: Doesn't seem to make sense.

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1 MR. GROSSMAN: Well, it's not unheard of. We
2 often take things out of order here because we don't have a
3 jury. So, theoretically, my brain can put it all back
4 together in some kind of order when I read the transcripts,
5 but are there other witnesses that you have who would not be
6 affected by Mr. Sullivan's completed testimony?
7 MS. ROSENFELD: Well, I think to the extent that
8 there's community testimony that we're aware of, they've
9 planned to come in tomorrow. I don't think there's
10 substantial numbers, but in terms of our own witnesses --
11 MR. GROSSMAN: Right.
12 MS. ROSENFELD: -- we're certainly not prepared to
13 start our case-in-chief on Friday.
14 MS. CORDRY: We have not started prepping our own
15 witnesses, putting our -- it's a full-time job, believe me,
16 Mr. Grossman, I'm sure you're aware, when preparing to cross
17 the witnesses we have here on top of, at least for me, I
18 have a full-time job. So I would certainly have a major
19 issue with that. We're going to have a lot more days after
20 August 2nd. I think it would, if we somehow manage to get
21 done -- I think you may be optimistic on getting through
22 those two witnesses -- but, you know, if we don't have
23 testimony on Friday, we don't have testimony on Friday. If
24 we do, we do, but --
25 MR. GROSSMAN: Well, I wouldn't blithely say that

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1 because whereas I know that, as you indicated earlier, that
2 it is an imposition on your time, it's also an imposition on
3 the applicant for this to go on for a long time too --
4 MS. CORDRY: Well, we --
5 MR. GROSSMAN: -- so I have to consider both, both
6 sides of this.
7 MS. CORDRY: We weren't the ones who didn't put
8 the reports together.
9 MR. GROSSMAN: I realize that there were errors
10 that had to be corrected. There were also changes that were
11 made in response to community concerns that were raised in
12 the hearing --
13 MS. CORDRY: In January.
14 MR. GROSSMAN: -- on the plans. Pardon me?
15 MS. CORDRY: They were raised in January, in
16 November, a year ago.
17 MR. GROSSMAN: Well, I wasn't trying to debate the
18 point with you. I --
19 MS. CORDRY: I understand. I understand.
20 MR. GROSSMAN: -- was just trying to say that I'm
21 trying to be fair --
22 MS. CORDRY: Yes.
23 MR. GROSSMAN: -- to both sides here --
24 MS. CORDRY: Yes.
25 MR. GROSSMAN: -- considering the issues that

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1 press on both.
2 MR. SILVERMAN: You know, sometimes in my
3 experience a little delay is helpful, gives people -- you
4 have suggested that the parties talk about the pedestrian
5 path. You --
6 MR. GROSSMAN: There's been a lot of time to talk,
7 and --
8 MR. SILVERMAN: Yes.
9 MR. GROSSMAN: -- nothing has prevented anybody
10 from getting together during this period of time. We've
11 had -- this has been strung out now since April. So I don't
12 know that we have to have a delay to do that. So I would
13 love to be able to have witnesses on August 2nd. Yes,
14 Ms. Harris.
15 MS. HARRIS: Here's another suggestion but we need
16 to confirm with our engineer --
17 MR. GROSSMAN: Okay.
18 MS. HARRIS: -- if we are able to have the plans
19 finalized by tomorrow and at some point tomorrow he can
20 bring them here and actually distribute hard copies --
21 MR. GROSSMAN: Okay.
22 MS. HARRIS: -- it's not as if they're looking at
23 them from scratch --
24 MR. GROSSMAN: Right.
25 MS. HARRIS: -- would that provide sufficient time

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1 that we could then put Dan Duke and Mark Willard on on
2 Friday, as well, with the proviso that I, or the caveat I
3 need to make sure they're available?
4 MR. GROSSMAN: Right.
5 MR. SILVERMAN: And I should -- yes, Dr. Adelman
6 is going to say what I was going to say.
7 MR. ADELMAN: Crucial point: It's not clear to me
8 when Dr. Chase will be testifying, and as you know, for the
9 opposition the health aspects are vital. So I personally
10 would find it very prejudicial to our side to have to begin
11 our testimony without having heard his testimony.
12 MR. GROSSMAN: No, we weren't talking about
13 beginning your testimony. We were talking -- we're past
14 that issue already because --
15 MR. ADELMAN: Oh, I'm sorry.
16 MR. GROSSMAN: -- your colleagues beat me to death
17 already with that suggestion. So I --
18 MR. ADELMAN: Okay. I'm sorry. I apologize.
19 MR. GROSSMAN: We were talking about putting on,
20 if in fact the plans could be finalized by tomorrow, putting
21 on Mr. Willard and Mr. Duke on Friday. That way you'd have
22 a few days, and there aren't any major changes. Yes.
23 MS. CORDRY: I mean, we haven't heard back from
24 Park and Planning on these, Pat, these plans yet. I mean,
25 are they still going to be weighing in before --

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1 MS. HARRIS: What we understood at our meeting
2 with Park and Planning is they've weighed in in their staff
3 report and they were -- I don't believe they were going to
4 weigh in again.
5 MS. ROSENFELD: So they don't anticipate making
6 any further comments on your plans?
7 MS. HARRIS: I don't believe so.
8 MR. GROSSMAN: They had indicated to me that their
9 preference was, instead of meeting with everybody, that they
10 would see whatever you put in as your final changes and then
11 they would say if they had a problem with, you know, what
12 you were, what you're suggesting.
13 MS. CORDRY: And I thought they were still
14 proposing to do a walk-around on the site and so forth, and
15 I --
16 MR. GROSSMAN: They talked about that too. So I
17 don't know --
18 MS. HARRIS: I think they did it.
19 MS. CORDRY: -- and I'm not aware that that's
20 happened.
21 MR. BRANN: I believe they already did that.
22 MS. CORDRY: Well, if they did, we haven't heard
23 anything, we haven't from our side --
24 MR. GROSSMAN: Well, I can contact, I can contact
25 them and see if we can get them to quickly respond to, if

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1 they have had them -- when were your final comments, when
2 were their comments answered by you?
3 MS. HARRIS: When did we meet with them --
4 MR. GROSSMAN: Well, I --
5 MS. HARRIS: -- was that your question? I'm
6 sorry.
7 MR. GROSSMAN: No, I don't know if you met with
8 them or not, but I'm just saying they had posed questions in
9 Exhibits 200(a),(b),(c), and (d), the plans which they had
10 written on. When did you answer those questions?
11 MS. HARRIS: We met with them to discuss them two
12 weeks ago, three weeks ago. I'm losing --
13 MR. GROSSMAN: Okay. Maybe by this time they have
14 had an opportunity to finalize whatever they're doing. I'll
15 check with them, when we break up here, and see if they've
16 got any final answers from their end.
17 MS. ROSENFELD: Pat, did you submit something to
18 them in response to their --
19 MS. HARRIS: No, we haven't yet. That's what I
20 need to check, if they're ready. Then we're going to submit
21 it to them --
22 MS. ROSENFELD: So even if you submit them
23 tomorrow, if they intend, if they plan follow-up comments,
24 they may or may not be ready by Friday. Is that --
25 MS. HARRIS: Well, but I don't know what Park and

1 Planning's comments on our plans have to do with us putting
 2 Dan Duke and Mark Willard on direct and cross-examination.
 3 I mean, staff is going to weigh in at some point, or not.
 4 MR. GROSSMAN: That's fair. So --
 5 MR. SILVERMAN: Can I just put another wrinkle in?
 6 MR. GROSSMAN: Oh, please don't.
 7 MR. SILVERMAN: As we --
 8 MR. GROSSMAN: I've got enough wrinkles already.
 9 MR. SILVERMAN: As we sit here, there are events
 10 in the real world that relate to Mr. Duke, for example, like
 11 floods in the area or a washout, outfalls, and other issues,
 12 which relate -- which hasn't happened before but which
 13 happened in, well, as we meet here, and we may want to ask
 14 him about that too. So I just wanted to let people know
 15 that.
 16 MR. GROSSMAN: You might want to ask him --
 17 MR. BRANN: I don't understand. What is the -- I
 18 don't understand the statement. There were floods and
 19 washouts?
 20 MR. SILVERMAN: Well, the, not to reveal too much,
 21 I see Ms. Rosenfeld is staring at me, but the emergency exit
 22 had some problems that we have recorded and, and the --
 23 MR. GROSSMAN: The emergency exit of what?
 24 MR. SILVERMAN: Of Costco, the warehouse, which
 25 bear on the quality of the flood management, and also the

1 outfall designed by Mr. Duke's firm does evidence some
 2 problems. So we may want to ask him about that, or we may
 3 just keep it and wait for our direct.
 4 MR. GROSSMAN: Mr. Silverman, I don't want to stop
 5 you before you ask a question and there's an objection to
 6 it, but bear in mind, you know, the evidence that I'm going
 7 to consider in making my findings and recommendation is
 8 hardly going to be stuff that's as peripheral as whether or
 9 not the door didn't work in a Costco warehouse.
 10 MR. SILVERMAN: Well, I --
 11 MR. GROSSMAN: I mean, that's not, it's not
 12 really, of all the evidence, with all these days of
 13 testimony and hearings and volumes of documents, if you
 14 think that's going to have any influence on me, it's really
 15 not. So let's try to keep it to what's really going to bear
 16 on this case.
 17 MR. SILVERMAN: I guess we'll wait for our
 18 case-in-chief, but --
 19 MR. GROSSMAN: All right.
 20 MR. SILVERMAN: -- I urge you to keep an open mind
 21 until you hear the case.
 22 MR. GROSSMAN: Well, I pride myself on my open
 23 mind, but I mean, I think you have to, you have to realize
 24 that we want to consider what's relevant --
 25 MR. SILVERMAN: I understand.

1 MR. GROSSMAN: -- and really can have an impact on
 2 the community here. All right. So it's a plan. Let's see
 3 if we can get the finalized plans by tomorrow. We'll plan
 4 on Mr. Flynn and hopefully Mr. Cronyn tomorrow afternoon and
 5 then -- failing that, I guess, on Friday, depending what the
 6 crowd is like -- and then Dan Duke and Mr. Willard on
 7 Friday.
 8 MS. ROSENFELD: And once you know what order you
 9 might call them, if you could let me know, that would be
 10 helpful.
 11 MS. HARRIS: Certainly, I will do that.
 12 MR. GOECKE: And so Mr. Sullivan is definitely not
 13 a potential witness on Friday?
 14 MR. GROSSMAN: We're trying not to do that because
 15 he does have other things to submit and --
 16 MR. GOECKE: But is --
 17 MR. GROSSMAN: -- in addition to the noise stuff,
 18 which hasn't been, we haven't seen that --
 19 MR. GOECKE: Right.
 20 MR. GROSSMAN: -- that evidence yet. So I think
 21 it would be, it would be better, and also, Mr. Silverman has
 22 asked if we can avoid that, and since you have to call
 23 Mr. Chase anyway, Dr. Chase, it seems to me that let's have
 24 a day with them.
 25 MR. GOECKE: Put them together?

1 MS. ADELMAN: Dr. Chase will be in September then?
 2 MS. HARRIS: Yes.
 3 MR. BRANN: Yes.
 4 MR. GROSSMAN: Yes, Dr. Chase and finish up
 5 Mr. Sullivan.
 6 MR. GOECKE: Okay.
 7 MR. GROSSMAN: All right.
 8 MS. HARRIS: Thank you.
 9 MR. GOECKE: Thank you.
 10 MS. ADELMAN: Mr. Grossman --
 11 MR. GROSSMAN: Yes, Ms. Adelman.
 12 MS. ADELMAN: -- I just wanted to remind Mr. Flynn
 13 that we'll be meeting on the seventh floor tomorrow so you
 14 don't come in here --
 15 MR. GROSSMAN: Well, that's a good, a good point.
 16 MS. ADELMAN: -- come in here and we're not here.
 17 THE WITNESS: Thank you. Thank you very much.
 18 MR. GROSSMAN: You might be sitting here all
 19 alone.
 20 MS. HARRIS: You may like the peace and quiet.
 21 MR. GROSSMAN: But you should certainly
 22 communicate with Ms. Harris's office as to the timing and
 23 all of that stuff because she --
 24 THE WITNESS: I will. Thank you.
 25 MR. GROSSMAN: -- she'll fill you in. All right.

1 Thank you, Mr. Flynn. Thank you all --
2 MR. GOECKE: Thank you.
3 MR. GROSSMAN: -- and hopefully I'll survive the
4 tree next to my house coming down, the neighbor's taking
5 down.
6 (Whereupon, at 4:00 p.m. the hearing was
7 adjourned.)

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C E R T I F I C A T E

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Office of Zoning and Administrative Hearings for Montgomery County in the matter of:

Petition of Costco Wholesale Corporation
Special Exception No. S-2863
OZAH No. 13-12

By:

Wendy Campos, Transcriber

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