

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
September 9, 2013, commencing at 9:38 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:

Patricia Harris, Esq.

Mike Goecke, Esq.

Lerch, Early & Brewer, Chartered

3 Bethesda Metro Center, Suite 460

Bethesda, Maryland 20814

For Kensington Heights Civic Association:

Michele Rosenfeld, Esq.

The Law Office of Michele Rosenfeld, LLC

11913 Ambleside Drive

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C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
Mark A. Willard				
By Ms. Harris		60		
By Mr. Adelman			73	
By Ms. Rosenfeld			85	
Clifford Scharman				
By Mr. Grossman	107		113	

E X H I B I T S

Exhibit No.		Marked/Received
266	Brochure	45

P R O C E E D I N G S

1 MR. GROSSMAN: This is the 12th 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 Section
5 59-G-2.06 to allow petitioner to construct and operate an
6 automobile filling station which would include 16 pumps.
7 The subject site is located at 11160 Veirs Mill Road, Silver
8 Spring, Maryland, Lot N, 631 Wheaton Plaza, Parcel 10, also
9 known as the Westfield Wheaton Mall, and is zoned C-2,
10 general commercial.

11 The hearing was begun on April 26, 2013, resumed
12 on May 1, May 6, May 23, June 4, June 17, June 19, July 8,
13 July 30, July 31, and August 2, 2013. It was noticed to
14 resume again today. The next session has been noticed for
15 Monday, September 16, 2013, in the second floor, that is
16 this hearing room, in the Council Office Building at 9:30
17 a.m.

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

24 MS. HARRIS: Good morning. Pat Harris of Lerch,

1 Early, & Brewer on behalf of the applicant.
2 MR. GROSSMAN: Hi, Ms. Harris. All right.
3 MR. GOECKE: Michael Goecke on behalf of Costco.
4 MR. GROSSMAN: I see Mr. Brann with you.
5 MR. BRANN: Erich Brann with Costco, yes, sir.
6 MS. CORDRY: Karen Cordry from Kensington Heights.
7 MR. GROSSMAN: Ms. Cordry.
8 MS. ROSENFELD: Michele Rosenfeld, legal counsel
9 to Kensington Heights.
10 MR. GROSSMAN: Ms. Rosenfeld.
11 MR. SILVERMAN: Larry Silverman, Stop Costco Gas.
12 MR. GROSSMAN: Hi.
13 MR. ADELMAN: Good morning, Mr. Grossman.
14 Dr. Mark Adelman for the Coalition.
15 MR. GROSSMAN: Good morning.
16 MS. ADELMAN: And Abigail Adelman for the
17 Coalition.
18 MR. GROSSMAN: All right. I see some --
19 MS. DUCKETT: Eleanor Duckett from Kensington
20 View.
21 MR. GROSSMAN: Ms. Duckett. All right. We see
22 other parties here who may wish to participate today. Would
23 you identify yourselves if you do wish to? Mr. Scharman.
24 MR. SCHARMAN: Clifford Scharman on behalf of
25 myself.

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1 MS. SCHARMAN: Barbara Scharman on behalf of
2 myself.
3 MR. GROSSMAN: All right. Anybody else in the
4 audience who is going to participate?
5 MS. SHEARD: Virginia Sheard on behalf of myself.
6 MR. GROSSMAN: Ms. Sheard. All right. All right.
7 Okay. Let's deal with some preliminary matters here first.
8 There were various filings and e-mail exchanges since our
9 last session. One of them was a motion of Dr. Adelman to
10 the Board of Appeals for summary disposition based on the
11 assertion that the applicant has improperly, quote,
12 increased the intensity of the use by slightly reducing the
13 size of the special exception site. That's Exhibit 258 in
14 the file. This motion is not before me, Dr. Adelman, so I
15 won't act on it. I would mention to you that I think you
16 may have misconstrued the terms intensity of the use from a
17 land-use perspective, which pertains more to something like
18 going from a single-family home to an apartment building
19 rather than a slight square-footage decrease in the size of
20 the site, but in any event, that'll be decided by the Board
21 of Appeals.
22 All right. Other significant filings include
23 Exhibit 249, which is received August 9, 2013, and that's a
24 letter from Mr. Goecke to me, transmitting the following
25 materials: a plan delineating Costco's parking field

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1 located to the west of the Costco warehouse; a formula for
2 converting NO2 parts per billion to cubic, to, I guess it's
3 written here as cubic metric feet, but it's actually
4 micrograms per cubic meter --
5 MR. GOECKE: Cubic meter.
6 MR. GROSSMAN: -- I guess is the correct term,
7 that's the way it was written in the exhibit list; copies of
8 revised pages 2 and 3 of supplemental data regarding the
9 testimony of Mr. Sullivan on June 17 and June 19, that's
10 Exhibit 189 parens b, parens double ii; page 58 of the air
11 quality, odor and noise analysis dated November 19; (e) a
12 noise study, proposed study, Costco Wheaton gas station,
13 July 20, 2013; cataloged site photos; and corrections, sub
14 (g) is corrections to the 11 slash 12 land-use report as
15 testified to by Mr. Gang.
16 Then Exhibit 255 is a letter from Mr. Goecke,
17 transmitting (a) the supplemental report of Mr. Sullivan
18 regarding these, his air analysis. Exhibit 256 -- his
19 report was dated August 16, by the way, 2013 -- Exhibit 256
20 was an August 22, 2013, letter from Ms. Harris, transmitting
21 landscape and master plans and planting plans and stormwater
22 management plans and the green-screen plan which had been
23 revised. Exhibit 259 was an e-mail indicating technical
24 staff approval of the plans listed above; 261, e-mails from
25 Mr. Scharman, attaching various exhibits. 262(a) is

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1 opposition to the, to the motion in limine which had been
2 filed -- I don't see the motion in limine listed here. Did
3 I read that off?
4 MS. ADELMAN: No.
5 MS. ROSENFELD: No. 262 is the motion in limine.
6 MR. GROSSMAN: I see, yes.
7 MS. ROSENFELD: I don't believe we've received an
8 opposition.
9 MR. GROSSMAN: Oh, I see. I'm sorry. I say -- I
10 misread it. 262(a) is the opposition's motion in limine --
11 that's the way I should have read it -- and 262(b) is the
12 affidavit of Dr. Henry Cole relating to the motion
13 in limine, and 263 is my e-mail saying that we were going to
14 go forward with Dr. Chase today subject to the possibility
15 of the testimony being stricken if the motion is granted.
16 And, also, I should mention, which didn't make it to my
17 list, that 264 was an e-mail from Ms. Rosenfeld regarding
18 witnesses and 265 were the landscaping plans with some
19 corrections because apparently they didn't include a plant
20 list. And so I guess that there's going to be no objection
21 to those kinds of corrections. Ms. Rosenfeld, I --
22 MS. ROSENFELD: We will not object.
23 MR. GROSSMAN: Okay. Anybody else?
24 MS. ROSENFELD: I would like the date that they
25 were actually filed listed under 265.

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1 MR. GROSSMAN: Yes. I don't have that in front of
2 me at this moment. It's not listed in the exhibit list.
3 Okay. The witnesses, as I understand, scheduled
4 for today are Mark Willard, the landscape architect;
5 Dr. Cole, I'm sorry, Dr. Chase; and conceivably, as I
6 understood it, was Ms. Cordry testifying out of order
7 specifically on the needs issue, but I'm not sure where that
8 stands, and I think the parties have indicated that they're
9 not going to do that.
10 MS. HARRIS: Right.
11 MR. GROSSMAN: Okay. All right. Does the
12 applicant plan to respond to the motion in limine?
13 MS. HARRIS: Yes.
14 MR. GOECKE: We do.
15 MR. GROSSMAN: All right. And --
16 MR. GOECKE: I can give you a preview of our
17 intended response, or if you just want to talk about when
18 you would like to receive it by.
19 MR. GROSSMAN: Yes, just tell me when you would --
20 MR. GOECKE: Is October 4th appropriate?
21 That's -- because then the next hearing date after that is
22 October 17th.
23 MR. GROSSMAN: Well, that's quite some time away.
24 I was thinking --
25 MR. GOECKE: Well, part of the reason is because

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1 on Wednesday the Board of Appeals is going to be addressing
2 the motion for summary disposition and this motion in limine
3 is derivative of that motion for summary disposition which
4 we've argued is procedurally improper. And so if that
5 motion is improper, then it follows that this motion would
6 therefore fail.

7 MS. ROSENFELD: No, I don't --
8 MS. CORDRY: No.
9 MS. ROSENFELD: No.

10 MR. GROSSMAN: Well, that's his --
11 MS. ROSENFELD: Well, okay.

12 MR. GROSSMAN: -- that's his opinion, and he
13 has -- he probably will disagree with you.

14 MR. SILVERMAN: What a surprise.
15 MS. ROSENFELD: Burst of outrage.

16 MR. GROSSMAN: But that seems like a long time to
17 wait to file something --
18 MR. GOECKE: Well --
19 MR. GROSSMAN: -- on this. I mean, I wasn't
20 thrilled --
21 MR. GOECKE: Part --
22 MR. GROSSMAN: -- I wasn't thrilled to get it just
23 a day, you know, working day and a half before the, before
24 this hearing date. On the other hand, it was filed within
25 two weeks after the revised report from Mr. Sullivan. So I

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1 don't think that's an unreasonable time given, given that --
2 MS. ROSENFELD: And, Mr. Grossman, if I might
3 speak to that. It wasn't --
4 MR. GROSSMAN: Right.

5 MS. ROSENFELD: -- the report itself, necessarily,
6 that we were responding to. You may recall we had asked for
7 the data, the urban data --
8 MR. GROSSMAN: Yes.
9 MS. ROSENFELD: -- that had been available
10 electronically, and on August 26th we received a disk, and
11 it did not appear to have the data that we were looking for.
12 I had several e-mail exchanges with Mr. Goecke on that point
13 and ultimately Ms. Harris on --
14 MS. HARRIS: The 26th.
15 MS. ROSENFELD: The first disk came out on August
16 13th. The second one we received on August 26. That did
17 have the data that we were looking for. Dr. Cole was on
18 vacation and unavailable by e-mail until September 3rd, and
19 he was able to review that data on September 3rd, and we
20 filed our motion on September 5th.

21 So it really was not a question of the report
22 per se. Once we were able to verify that the data that we
23 had been looking for and make the comparisons we were trying
24 to make, we filed it as soon as reasonably possible --
25 MR. GROSSMAN: Okay.

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1 MS. ROSENFELD: -- and so I want the record to
2 reflect why it is that it was filed when it was filed.

3 MR. GROSSMAN: And it now reflects that. I was
4 just saying that because it was very close to the hearing,
5 it didn't really give us the opportunity either to get
6 Applicant's response and, because you were requesting relief
7 that would be, in effect, in today's hearing -- that is, the
8 barring of Dr. Chase's testimony -- it really posed an
9 impossible question for us to rule on at this point. So
10 that's why we are going ahead with the hearing today,
11 whatever my view is of the motion.

12 MR. GOECKE: If I may, Mr. Grossman, just a few
13 more points about why we would like the additional time. We
14 also have a hearing on the 16th in which Mr. Sullivan is
15 going to testify --
16 MR. GROSSMAN: Right.
17 MR. GOECKE: -- and then I've got a jury trial the
18 rest of this week. So Dr. Chase is going to testify today;
19 that was part of the relief they were seeking. The other
20 part of the relief they were seeking was to strike
21 Mr. Sullivan's report --
22 MR. GROSSMAN: Right.
23 MR. GOECKE: -- under the sham affidavit argument.
24 MR. GROSSMAN: Right.
25 MR. GOECKE: It would be difficult for us to

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1 prepare a brief between now and when Mr. Sullivan is
2 scheduled to testify. So --
3 MR. GROSSMAN: I understand.

4 MR. GOECKE: -- as you indicated in your e-mail,
5 Dr. Chase is going to testify subject to ultimately your
6 ruling that could strike his testimony --
7 MR. GROSSMAN: Right.
8 MR. GOECKE: -- but we would prefer to proceed
9 that Mr. Sullivan will testify under the same grounds and
10 that we would then have a chance to brief it more fully,
11 just because we're not going to have an opportunity to do
12 that this week.

13 MR. GROSSMAN: All right. Yes, Ms. --
14 MS. ROSENFELD: If I may for the record, I would
15 like to submit a copy of the disk that we received on August
16 13th --
17 MR. GROSSMAN: Certainly.
18 MS. ROSENFELD: -- reflecting that the data was
19 not in there, and I would like to renew our motion that
20 Dr. Chase not take the stand today. The fact that -- I
21 appreciate the fact that his testimony can get stricken at
22 some point, but it's difficult to unscramble the egg once he
23 has, once he has testified. And I certainly would object to
24 having Mr. Sullivan testify before there's a ruling on the
25 motion in limine. It seems an extraordinary waste of time

1 to prepare for and conduct what will easily be a daylong
 2 hearing if ultimately his testimony is not admissible.
 3 MR. GROSSMAN: I don't --
 4 MS. ROSENFELD: Ms. Cordry is prepared to go on
 5 the 16th.
 6 MR. GROSSMAN: I would say, as far as unscrambling
 7 the egg, I mean, that's what I'm required to do in this
 8 case, in any event --
 9 MS. ROSENFELD: I understand that. I understand
 10 that.
 11 MR. GROSSMAN: -- and I am going to deny the
 12 renewed motion, and we're going to go ahead with Dr. Chase
 13 today. I am going to ask that Dr. Chase testify and
 14 Mr. Sullivan, when he comes back, if he testifies on, next
 15 week, on the -- on both assumptions, both the assumptions
 16 that originally existed in Mr. Sullivan's report and on the
 17 relaxed assumptions, we'll call them, in his August 16
 18 report, so that we'll have Dr. Chase's opinion in both
 19 directions should the testimony, or should the later report,
 20 change of assumptions, not be allowed, okay?
 21 MR. GOECKE: Thank you.
 22 MR. GROSSMAN: That may, to that extent, resolve
 23 the issue. I'm hesitant to require the applicant to respond
 24 to this motion given that it is going to be Wednesday before
 25 the, before the Board of Appeals even hears the motion that

1 you have pending with them. That really, even aside from
 2 the jury trial question that Mr. Goecke has, it doesn't
 3 really give them a lot of time to respond and file something
 4 in time for me to act prior to Mr. Sullivan's scheduled
 5 testimony.
 6 So I'm inclined to treat Mr. Sullivan the same way
 7 as I am Dr. Chase today and allow him to testify, addressing
 8 both sets of assumptions and his conclusions based on both
 9 sets of assumptions, and then acting to strike whatever
 10 portion of the testimony relates to the second set of
 11 assumptions if I find that they're improperly before me.
 12 MS. ROSENFELD: The complicating factor from my
 13 point of view is the fact that his report contains a whole
 14 new set of standards. He's modified his modeling
 15 assumptions.
 16 MR. GROSSMAN: Right.
 17 MS. ROSENFELD: So we have that report. What we
 18 don't know is what his testimony will be or have a report
 19 that talks about what they would be, what his testimony
 20 would be using the original urban data, and so we don't have
 21 that information before us and so can't prepare for that
 22 line of testimony.
 23 MR. GROSSMAN: Well, I think we do know what his
 24 testimony is regarding the original assumptions. I'm not
 25 sure I understand.

1 MS. ROSENFELD: He said he didn't have that
 2 information in his report, he didn't have it with him, and
 3 his testimony was that he couldn't speak on the urban
 4 numbers at the time of the last hearing.
 5 MS. CORDRY: And if I might add one other point
 6 which is with respect to Dr. Chase. We have no report from
 7 Dr. Chase whatsoever with respect to these relaxed
 8 assumptions. We have no idea what he's going to say. We
 9 have no ability -- normally, you know, the expert reports
 10 are supposed to have been in at least 10 days in advance.
 11 So his report was put out on August 16th, but we have gotten
 12 nothing revised from Dr. Chase with respect to his report.
 13 So I think I -- we would certainly have real
 14 issues with his being allowed to testify with respect to the
 15 relaxed assumptions. I think he has to testify with respect
 16 to what he's put his expert report on, which was only the
 17 original assumptions.
 18 MR. GROSSMAN: Want to speak to that, Mr. Goecke?
 19 MR. GOECKE: Well, he is going to testify about
 20 the revised report as well. He has not prepared a
 21 supplemental report. He's going to opine on it. They're
 22 free to cross-examine him. I don't think we're required to
 23 provide them with a report every time they ask for one.
 24 His --
 25 MR. GROSSMAN: I don't think that's the issue. I

1 mean, there is a requirement for providing the expert
 2 reports, that is, or a summary of what's going to be
 3 testified to --
 4 MR. GOECKE: Sure.
 5 MR. GROSSMAN: -- by each side, each
 6 organizational side; it's not required for individuals,
 7 but -- and so the question is whether or not, when you have
 8 a change in some of the underlying assumptions in the middle
 9 of a hearing --
 10 MR. GOECKE: Yes.
 11 MR. GROSSMAN: -- whether or not then an
 12 additional report has to be filed by the expert. The
 13 opposition is suggesting that an additional report should
 14 have been filed by Dr. Chase, addressing the, his -- what
 15 his conclusions are based on the relaxed assumptions if he's
 16 going to testify as to the relaxed assumptions. That's the
 17 argument. Do you want to respond to that?
 18 MR. GOECKE: The supplemental report filed on
 19 August 16, 2013, has not changed Dr. Chase's overall
 20 opinions. So he's prepared to testify about the potential
 21 or non-existent adverse health effects caused by the
 22 emissions from the gas stations at various levels.
 23 So, to the extent that Mr. Sullivan's report has
 24 been updated to reflect different methodologies and
 25 different results, he can talk about what that means when

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1 the levels are not in exceedance and when they do have an
2 exceedance. So I don't think that's real deviation from
3 what he was talking about before. Now, obviously, the
4 initial report had different numbers that he was basing his
5 conclusions on, but ultimately it doesn't affect his
6 ultimate opinions today.

7 MS. ROSENFELD: And if I could read from
8 Dr. Chase's report, he says -- the third full paragraph
9 starts with the sentence: In reaching these opinions, I
10 have relied on the comprehensive sampling data for a similar
11 Costco gas station in Sterling, Virginia, as well as
12 modeling data reported by David Sullivan November 2012 for
13 the proposed site in Wheaton. And that is the sole basis
14 for his report and his conclusions, and to the extent he
15 tries to testify beyond that, I'd proffer that we will be
16 objecting to that entire line of direct examination this
17 morning.

18 MR. GROSSMAN: All right. You're reading from
19 Exhibit 15(b), as in boy?

20 MS. ROSENFELD: That's correct.

21 MR. GROSSMAN: And which paragraph was that?

22 MS. ROSENFELD: The first sentence in the third
23 paragraph.

24 MR. GROSSMAN: Okay. Would Dr. Chase be available
25 for this coming Monday's hearing?

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1 MR. GOECKE: I'd have to check with him.

2 MR. GROSSMAN: Why don't you check with him?

3 MR. GOECKE: We think so, Your Honor.

4 MR. GROSSMAN: All right.

5 MS. HARRIS: Mr. Grossman --

6 MR. GROSSMAN: Yes.

7 MS. HARRIS: -- if I could just add one thing, and
8 that is, Dr. Chase's report of November 19th was a two-page
9 report --

10 MR. GROSSMAN: I know.

11 MS. HARRIS: -- which was more conclusionary in
12 nature. And --

13 MR. GROSSMAN: True.

14 MS. HARRIS: -- so, be that as it may, it looks
15 like -- I mean, he could substitute the November, the August
16 13th, 2013, date, reach the same conclusions as he had in
17 his report, and that's what we would be providing. So I
18 don't understand really the nature of needing a new report.

19 MR. GROSSMAN: Well, I will concede that his
20 report is conclusory, and maybe it won't, a revised report
21 won't be that much more elucidating to the other side. On
22 the other hand, I am concerned that -- I don't know that in
23 advance of what he's going to file --

24 MS. HARRIS: Understood.

25 MR. GROSSMAN: -- what he would file as an amended

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1 report, number one. Number two, there is a legitimate point
2 to be made here by the other side in terms of their
3 preparation because of the change made in, you know, the
4 middle of August in the underlying assumptions, which I
5 really can't -- I can't blame the opposition. I mean, this
6 all resulted from, or at least this change process, and it
7 was initiated by a mathematical error by the applicant's
8 expert; so -- which apparently caused him to feel the need
9 to revise his underlying assumptions from what he
10 characterized as very conservative to less conservative, or
11 more closely approaching truth, I guess, is his, what he
12 characterized it in some way.

13 So, given that, I am inclined to say that -- I
14 would ask that a, if Dr. Chase is going to testify from the,
15 based on the revised assumptions, that he file no later than
16 tomorrow -- since he's apparently available today, he'll
17 have time to do it -- no later than tomorrow a revised
18 report indicating what his testimony would be based on the
19 revised assumptions, and then he can testify on September 16
20 for both, on both factual scenarios, on both --

21 MR. ADELMAN: Mr. Grossman, are you saying that
22 Dr. Chase would not testify today --

23 MR. GROSSMAN: That's correct.

24 MS. ADELMAN: -- but instead testify --

25 MR. GROSSMAN: I'm granting the, in effect, the

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1 motion, the procedural motion by the opposition to not have
2 Dr. Chase testify today. I should, I guess I should ask --
3 that's made by Kensington Heights Civic Association -- is
4 that the position of the Coalition as well, that you do not
5 wish to have Dr. Chase --

6 MS. ADELMAN: Yes. Yes, and we, we're in support
7 of the motion.

8 MR. GROSSMAN: What about Kensington View Civic
9 Association?

10 MS. SHEARD: Yes.

11 MR. GROSSMAN: You agree with that? Okay. And I
12 take it, Mr. Scharman, do you have a position on this?

13 MR. SCHARMAN: No position.

14 MR. GROSSMAN: All right.

15 MS. ROSENFELD: And, Mr. Grossman, if we could
16 turn for a moment to Mr. Sullivan. The Board is scheduled
17 to take up the motions for summary disposition on Wednesday.

18 MR. GROSSMAN: Yes.

19 MS. ROSENFELD: With some frequency, they actually
20 rule the same day that they take up matters. So we --

21 MR. GROSSMAN: Right.

22 MS. ROSENFELD: -- may well know on Wednesday what
23 their decision is, one way or the other. I would like to
24 suggest that we bring Dr. Chase and Ms. Cordry on the 16th
25 and give Costco reasonable opportunity to file a motion, to

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1 file a response to the motion in limine specific to
2 Mr. Sullivan, and I think that would allow ample time for
3 them to respond and you to make a decision on that motion
4 before he comes forward, if he comes forward. It just seems
5 to me it makes a lot more sense to know what evidence we're
6 going to be questioning him on in advance of his testimony.
7 I'm confident it's going to be a long day either way, and it
8 just doesn't make sense to spend time speculating on what
9 the scope of the evidence will be.

10 MR. GROSSMAN: In terms of Dr. Chase's testimony,
11 how long do you think Dr. Chase's direct will be?

12 MR. GOECKE: Forty-five minutes.

13 MR. GROSSMAN: All right. What do you think about
14 the suggestion made by Ms. Rosenfeld that we proceed with
15 Dr. Chase and with Ms. Cordry on the 16th and postpone
16 Mr. Sullivan until the next hearing date?

17 MS. CORDRY: I would suggest that would let
18 Mr. Flynn get off on his motorcycle trip a few days sooner,
19 if he chooses.

20 MS. HARRIS: It would; however, we -- we were
21 proceeding, ever since the receipt of Ms. Rosenfeld's e-mail
22 laying out the order, that Ms. Cordry would be testifying on
23 September 20th. On Friday, Thursday, excuse me, we received
24 a stack of documents that thick regarding --

25 MR. GROSSMAN: That thick being for the record

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1 about three inches?

2 MS. HARRIS: About three inches, four inches
3 thick --

4 MR. GROSSMAN: All right.

5 MS. HARRIS: -- that Ms. Cordry was going to be
6 relying on for her testimony, some of which, I would add,
7 were websites and not even hard documents or electronic
8 documents, which I would like to raise that as an issue
9 later, but in any event, so we were prepared to go forward
10 on the 20th with Ms. Cordry. Mr. Flynn has changed his
11 travel plans, expecting that Ms. Cordry would be going on
12 the 20th, and I, I feel like given everything else that's
13 going on, including preparation of the motion, we would be
14 pressed to be ready for Ms. Cordry on the 16th.

15 MS. CORDRY: Although I would note that that is
16 more than 10 days in advance that I gave those and that the
17 sites are all to reports. I mean, I can print out a copy of
18 the report for them, as well, if they need them, but --

19 MR. GROSSMAN: I assume, Ms. Cordry, that your
20 testimony is going to be similar to what's already reflected
21 in at least three documents that I've seen you have filed
22 with technical staff and directly with the Planning Board in
23 this case.

24 MS. CORDRY: It follows that. The kind of
25 documents that I submitted are things that go to, for

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1 instance -- there's several reports in there that have to do
2 with analyses of whether or not driving and gasoline usage
3 in the future is going to continue to drop, several reports
4 to that fact. I don't really intend to spend an enormous
5 amount of time or be, you know, in great detail about those
6 other than to say that here are a number of, you know,
7 sophisticated reports making that point, which is
8 supplementary of the point from the Energy Information
9 Administration.

10 So although each report has a fair amount of
11 length to it, I'm not expecting to spend vast amounts of
12 time, myself or them, either way, just pointing out that
13 those reports are out there and they exist. I probably will
14 pull out an executive summary from them and submit that as
15 well, but yes, all of that goes to the point that we've --
16 all the points, I think, that I'm going to testify about I
17 believe that I've pretty much made in my original filings.

18 MR. GROSSMAN: What about Mr. Sullivan's
19 availability -- I think our next hearing after the 16th is
20 the following Friday, if I recall. What date is that?

21 The --

22 MR. SILVERMAN: 20th.

23 MS. HARRIS: The 20th.

24 MR. GROSSMAN: 20th. What about his availability
25 on the 20th?

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1 MS. CORDRY: Do we know?

2 MS. HARRIS: I don't know. We would have to
3 check --

4 MR. GOECKE: Right.

5 MS. HARRIS: -- and we can, he's out of the
6 country right now, but we can e-mail him and hopefully have
7 an answer.

8 MR. GROSSMAN: All right. So why don't we
9 postpone until, if you can -- if you think you can get an
10 answer from him, postpone a decision on the scheduling at
11 least until later today and see if we can find out what the
12 story is. And, instead of giving you until October for
13 responding to the motion, today is the --

14 MR. SILVERMAN: 9th.

15 MS. HARRIS: 9th?

16 MR. GROSSMAN: -- 9th, the Board of Appeals meets
17 on the 11th, so let's say by the 18th a response -- I'd
18 actually like it earlier than that so I have a chance to
19 act. How about, instead of the 18th, how about if we say
20 that Monday, the 16th?

21 MS. HARRIS: So that gives less than a week after
22 the Board of Appeals acts.

23 MR. GROSSMAN: That's correct.

24 MR. ADELMAN: Mr. Grossman --

25 MR. GROSSMAN: So that would be for Applicant's

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1 response to the motion in limine. Dr. Adelman.
2 MR. ADELMAN: I'm sorry. I've gotten lost. It's
3 my understanding --
4 MR. GROSSMAN: You're probably not the only one.
5 We're all lost.
6 MR. ADELMAN: I'm trying to parse your vision of
7 how the session, the hearing today will go if Mr. Willard
8 testifies but neither Dr. Chase nor Ms. Cordry testifies.
9 Does that mean we'll be in an abbreviated session today and
10 also on the 16th or --
11 MR. GROSSMAN: Well, the 16th we'll -- I conceive
12 of it being a long session, but yes, this will be
13 abbreviated today.
14 MR. ADELMAN: Thank you, I think.
15 MR. GROSSMAN: I don't know that I can avoid it.
16 I mean, I don't want to prejudice the opposition here,
17 and -- you know, I don't want to prejudice either side, and
18 so --
19 MR. ADELMAN: Understand.
20 MR. GROSSMAN: -- I'm trying to balance these
21 conflicting process issues. So why don't we try to, if you
22 can, try to find out from Mr. Sullivan, before we close
23 today, as to what his availability will be --
24 MS. HARRIS: I'm doing that now.
25 MR. GROSSMAN: -- so we can see.

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1 MR. SHEVEIKO: A quick question, Mr. Grossman.
2 MR. GROSSMAN: Mr. Sheveiko, identify yourself for
3 the record because you --
4 MR. SHEVEIKO: Danila Sheveiko --
5 MR. GROSSMAN: Yes.
6 MR. SHEVEIKO: -- Kensington Heights Civic
7 Association. Quick question.
8 MR. GROSSMAN: Yes.
9 MR. SHEVEIKO: So if the applicant submits their
10 opposition to the motion in limine on the 16th, that means
11 you will rule on it on the 20th? Is that --
12 MR. GROSSMAN: I will try to rule on it before the
13 20th.
14 MR. SHEVEIKO: Okay, understood, great. Thank
15 you.
16 MR. GROSSMAN: That would be what I would attempt
17 to do.
18 MR. SHEVEIKO: All right, thank you.
19 MR. GROSSMAN: Even if I don't file an opinion
20 per se, I would at least rule on it. Mr. Scharman.
21 MR. SCHARMAN: Your Honor, at the conclusion of
22 the last hearing, you indicated that if there was time,
23 you'd prefer to hear the proposed exhibits that we submitted
24 about a week and a half ago, and I'd ask for permission to
25 testify about the proposed exhibits if there is time.

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1 MR. GROSSMAN: Yes, I think we're going to have
2 time today, as it turns out, if we have Mr. Willard but not
3 Dr. Chase. It seems to me that that would be something that
4 would make sense. Does anybody object to that?
5 MS. HARRIS: No, except unfortunately I wasn't
6 expecting that; so I don't have copies of them. So if
7 copies could be provided, that would be helpful.
8 MR. GROSSMAN: Okay.
9 MR. SCHARMAN: I can provide you with copies.
10 MR. GROSSMAN: Mr. Scharman will provide copies.
11 MS. HARRIS: Thank you, appreciate it.
12 MR. GROSSMAN: All right. So that'll give us some
13 additional material for today. Anything else? Okay.
14 MS. HARRIS: I had another preliminary matter.
15 MR. GROSSMAN: Well, let me -- I have a few more
16 here, I guess.
17 MS. HARRIS: Oh. Okay, good, you go first.
18 MR. GROSSMAN: All right.
19 MS. ADELMAN: Mr. Grossman, may I just for
20 clarification --
21 MR. GROSSMAN: Yes.
22 MS. ADELMAN: -- to follow Mark's question, by the
23 end of the day, we should have much more understanding of
24 what we're going to be doing on the 16th and the 20th?
25 MR. GROSSMAN: We hope. If we --

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1 MS. ADELMAN: We hope, right.
2 MR. GROSSMAN: -- hear back from Mr. Sullivan,
3 that'll help.
4 MS. ADELMAN: Yes.
5 MR. GROSSMAN: Okay. I do have a question for the
6 parties regarding how to apply the EPA regulations in my
7 analysis, and it's similar to one that I previously asked
8 the parties to address regarding the noise regulations,
9 essentially whether my focus should be on the likely
10 incremental increase in pollutants from the proposed gas
11 station or on the resulting totals. So would the EPA air
12 quality standards and methodologies prohibit a project which
13 produces a small incremental increase in particulate matter
14 or in volatile organic compounds but one which drives the
15 overall previously borderline level of that substance above
16 the air quality standard?
17 So I'm not implying that I have concluded anything
18 regarding the situation here, but rather, I'm trying to
19 reach the correct analytical framework, depending on the
20 evidence here. So I would like the parties, once again, at
21 some point, to address that, both -- that kind of analytical
22 question, regarding both noise and pollutants.
23 MR. SILVERMAN: Can we address that now?
24 MR. GROSSMAN: No. You might think about it, but
25 you address it --

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1 MR. SILVERMAN: It's an easy one.
2 MS. CORDRY: Yes. Yes, it is easy, but we'll --
3 MR. GROSSMAN: One last preliminary matter I have
4 is that, it may not be a problem today, but any Monday or
5 Friday or, for that matter, a Wednesday, that I will have to
6 conclude the hearing on those days, to the extent we have
7 them on those days, between 4:30 and 4:45. I have to attend
8 my cardiac rehab, which my --
9 MS. HARRIS: And what dates were those?
10 MR. GROSSMAN: Any Mondays and Fridays. So --
11 MS. HARRIS: Okay.
12 MR. GROSSMAN: My staff calls that the spa. It's
13 so not, but -- so it shouldn't cut off much time, but I mean
14 it would be at least 15 minutes earlier than we're used to
15 terminating. All right. Any other preliminary matters?
16 Ms. Harris.
17 MS. HARRIS: Yes, and we're seeking clarification
18 regarding when Opposition's reports that they're planning to
19 rely upon should be submitted. As I previously noted, we
20 had received reports that Ms. Cordry was going to rely on on
21 Thursday at which time they had an expectation that she was
22 going to be testifying on Monday, which clearly isn't the 10
23 days.
24 So we would seek clarification on that, that I'm
25 assuming that the 10-day rule applies similarly to the

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1 opponents, and then, also, as I noted, we've tried extra
2 hard to provide electronic and hard copies of everything
3 that we've produced, and we would expect the same as opposed
4 to just website references. So if hard copies and
5 electronic copies of what they're, the reports that they're
6 planning to use can be provided as well, that would be
7 appreciated.
8 MS. CORDRY: And just --
9 MR. GROSSMAN: Well, my first question is, are
10 hard copies of something going to be filed here?
11 MS. CORDRY: Well, I was, in fact, I spent a good
12 deal of yesterday at the office, which I will repay, using
13 the office copier to make copies of, you know, portions of
14 these reports, anyway, that -- various things I was planning
15 on specifically referring to in the testimony and so forth.
16 I thought we had had, actually, a discussion through
17 Mr. Silverman at some point that it would be appropriate, at
18 least in terms of, you know, for preliminary purposes, 10
19 days in advance. I didn't know that I really needed to
20 print out a copy and mail it to them, or something like
21 that, as opposed to them being able to simply download it.
22 But, I mean, I definitely would be planning on bringing a
23 hard copy of, you know, hard copies for the, to be placed
24 into the formal exhibit record, but I thought we had talked
25 about that, that these, you know, the reports are fairly

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1 voluminous in some respects, and at least the one that was
2 most voluminous, the Energy Information agency report, I did
3 specifically identify specific pages for it. The other
4 ones, if we have to use our money to print them out for
5 them, I suppose, in advance, I suppose we can do that, but I
6 thought we had talked that it was appropriate to simply give
7 a link that they could download the report and view them at
8 least in advance. You tell us what we need to do and we'll
9 do it, I guess.
10 MR. GROSSMAN: When you say somewhat voluminous,
11 how voluminous are we talking?
12 MS. CORDRY: Well, each of the -- there's three
13 reports by, per group, each of which is 20 to 40 pages.
14 There was some -- I mean, probably each one of those reports
15 is in the 20- to 40-page range, and there was different
16 numbers of them that we had there, I'd have to look up in
17 the log, but --
18 MR. GROSSMAN: But I guess my question went to,
19 you're planning to file a copy of these reports?
20 MS. CORDRY: I was certainly planning, when I came
21 to the hearing and testified, to the extent that I refer to
22 any particular report, I was planning on bringing at least,
23 you know, printed out copies for the formal record, yes.
24 MR. GROSSMAN: Okay. I don't know that it's that
25 much more of a burden, if you're going to file something

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1 already in hard copy, to make a copy for the other side in
2 advance, if you're going to. I was just thinking that, in
3 general, you know, providing a link of something you want
4 to --
5 MS. CORDRY: Okay.
6 MR. GROSSMAN: -- might be sufficient in advance,
7 but if you're actually going to file something --
8 MS. CORDRY: Well --
9 MR. GROSSMAN: -- then you're just talking about
10 making an extra copy. So --
11 MS. CORDRY: Well, I sent them a link. I was
12 working at home --
13 MR. GROSSMAN: Right.
14 MS. CORDRY: -- on my home computer with a little,
15 you know, home printer --
16 MR. GROSSMAN: Right.
17 MS. CORDRY: -- that I was not even printing out
18 for myself, necessarily. I --
19 MR. GROSSMAN: Right.
20 MS. CORDRY: -- was looking at these documents.
21 By the time, 10 days later or several days later, whatever,
22 that I came to be able to actually be at the hearing, I was
23 planning on, at some point, being able to get to a place
24 with a better copier, but it's -- I don't have the resources
25 of a law office to do these.

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1 MR. GROSSMAN: No, I understand, and I --
2 MS. CORDRY: Right. So --
3 MR. GROSSMAN: -- don't want to burden anybody
4 here --
5 MS. CORDRY: Right.
6 MR. GROSSMAN: -- just it seems to me that if you
7 are, if we're just talking about making, you know, copies of
8 a 20-page document, even if you paid a nickel a page, you're
9 talking about \$1. You know, I don't think we're talking
10 about a big, a big burden in terms of expense or time to
11 reproduce a 20-page document or something like that if
12 you're planning to file it anyway.
13 MS. CORDRY: Well, as we said, it's --
14 MR. GROSSMAN: I understand.
15 MS. CORDRY: -- it is, there are some fairly
16 voluminous materials there. By the time we get, I mean, I
17 don't -- I thought we had this discussion and it was agreed
18 that we could give people links, that they could use them,
19 that when we came to the hearing date, we would have them.
20 MR. GROSSMAN: And I think that's true. It's been
21 so long since we --
22 MS. CORDRY: Right. Right.
23 MR. GROSSMAN: -- it's hard to remember back --
24 MS. CORDRY: Right.
25 MR. GROSSMAN: -- exactly what we, what we said

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1 about that thing, but I --
2 MS. CORDRY: So that's the basis on which I was
3 operating. Also, I was on operating on the basis I'm not an
4 expert, and I thought most of this applied to expert
5 reports, but I certainly did want to give it to them in
6 advance so that they would not be surprised when we got to
7 these things, especially since it's the sort of thing you
8 would expect their expert would have been looking at, but
9 I --
10 MR. GROSSMAN: By the way, are these things that
11 you're talking about, are they referenced in the other
12 documents that you have filed? You have filed a number, as
13 I say, a number --
14 MS. CORDRY: Okay.
15 MR. GROSSMAN: -- of documents that I've seen in
16 the record.
17 MS. CORDRY: The Energy Information agency report
18 was documented in that.
19 MR. GROSSMAN: Okay.
20 MS. CORDRY: These other ones are reports that
21 have come out since those filings in --
22 MS. ROSENFELD: March.
23 MS. CORDRY: -- which were filed in January and
24 February. These are ones that are coming out in March,
25 April, May. There's a lot of document -- of analysis and

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1 reporting going on right now about the apparent trend,
2 apparently a fairly permanent trend in downward use of cars,
3 gasoline, driving, and so forth. So there's a lot of
4 research going on on that right now.
5 MR. GROSSMAN: All right. Well, I think what I'd
6 say about this, if you are printing something out that you
7 are planning to file in hard copy or seek to introduce in
8 hard copy, then I see little additional burden in providing
9 a hard copy to the other side. If it's something where
10 you're just referencing, for example, people cite a case,
11 that EPA case that had been cited earlier by you and by
12 Mr. Silverman, you know, you don't have to file a hard copy
13 of that because it is common practice to have a cited case.
14 So I, I think we were talking more about that at the time,
15 but in any event, so you know, I'm trying to strike a
16 balance here. I just don't --
17 MS. CORDRY: Right.
18 MR. GROSSMAN: -- I don't want to burden you, but
19 if it's not that much of a burden for something you're
20 already printing out, then, you know, give them a copy.
21 MS. CORDRY: And I will just let you know, there
22 were some other smaller, limited exhibits that I was
23 planning on bringing that, again, were things I think I had
24 generally referenced in my report. I printed out copies of
25 those last night. I will tomorrow try to pull those out,

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1 and I can send a copy of those over to the folks if they'd
2 like to see them.
3 MR. GROSSMAN: Okay. I think, you know, I'm just
4 trying to balance your, the burden concerns that you have
5 against --
6 MS. CORDRY: Right. Right.
7 MR. GROSSMAN: -- the fairness, advanced
8 knowledge --
9 MS. CORDRY: Because I don't think every exhibit
10 that the other side has put in, that they have provided to
11 us in advance as opposed to having copies at the hearing,
12 but I don't necessarily object to that particular --
13 MR. GROSSMAN: Ms. Harris.
14 MS. HARRIS: I mean, that's helpful. Another
15 critical thing, though, is the timing of it. I mean, again,
16 as Ms. Cordry said, some of these reports are 20, 40, 60
17 pages. Sometimes she identified pages that she was going to
18 rely upon; others, she didn't. So while she may only be
19 relying on two pages, I don't know which two pages; so we
20 need to review all of it --
21 MR. GROSSMAN: Right.
22 MS. HARRIS: -- and so therefore I think 10 days
23 in advance is helpful.
24 MR. GROSSMAN: By the way, if that is the case,
25 that there's two pages of a 20-page document that you're

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1 relying on and not the rest --
2 MS. CORDRY: Well --
3 MR. GROSSMAN: -- please point that out to the
4 other side --
5 MS. CORDRY: Right.
6 MR. GROSSMAN: -- in advance so that they have an
7 opportunity to cut down on their --
8 MS. CORDRY: Right. And as I say, I think, in
9 terms of the report, say, for instance, the study reports on
10 the reduction in driving, I mean, I would rely in a sense on
11 the entire report but I think that you can read the
12 executive summary and see what their conclusions are and
13 that's really, basically, my point, is that there is a lot
14 of research going on now that will say X. Now, can anybody
15 prove that that's absolutely yes or no, but I'm simply
16 putting it in for those points. And again, at this point,
17 whatever the point it would have been, had they gotten it --
18 if I was going to testify today, the reality is I'm not
19 going to testify until at least the 16th. So they've had it
20 for at least 10 days and whatever date it will be. So --
21 MR. GROSSMAN: Yes.
22 MS. HARRIS: Exactly, and that's why I said in
23 this case luckily it wasn't a problem. I just don't want to
24 have to have this conversation every time a new -- a new
25 witness is coming up.

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1 MR. GROSSMAN: Right. I think both sides have
2 tried to be fair in terms of this --
3 MS. HARRIS: Yes.
4 MR. GROSSMAN: -- so I have no complaints about
5 that. I'm just trying to, once again, balance those burdens
6 against, against the fair disclosure aspects of this. Okay.
7 Ms. Harris, did you have any additional --
8 MS. HARRIS: I did not.
9 MR. GROSSMAN: -- preliminary matters? Anybody
10 else have any preliminary matters? All right. Dr. Adelman.
11 MR. ADELMAN: I have a couple of very minor
12 procedural questions.
13 MR. GROSSMAN: Okay.
14 MR. ADELMAN: The first is with respect to Exhibit
15 10, which is the land-use report. I wonder if Ms. Harris
16 could clarify. On page 19 in the first full paragraph,
17 there's reference to, quote, the health analysis. Am I
18 correct in assuming that that's a reference to Dr. Chase's
19 report?
20 MS. HARRIS: Bear with me. You said page 10?
21 MR. ADELMAN: Page 19.
22 MR. GROSSMAN: Page 19 of Exhibit 10, the
23 land-use -- Mr. Gang's land-use report.
24 MR. ADELMAN: The paragraph begins: The proposed
25 filling station.

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1 MS. HARRIS: Yes. Yes.
2 MR. ADELMAN: Correct. Yes?
3 MS. HARRIS: Correct.
4 MR. ADELMAN: Okay, thank you. And similarly,
5 there was a revision to that report filed -- if I got it
6 right, it's Exhibit 249(g) -- which has a list of
7 corrections, and I do not see called out a correction of
8 that item on page 19. So am I correct in assuming that it
9 still stands that the reference to, quote, the health
10 analysis is still to Dr. Chase's report?
11 MS. HARRIS: Correct.
12 MR. ADELMAN: Fine, thank you. And then this is
13 with respect to OZAH Exhibit 3, which is Petitioner's
14 statement. The list of exhibits which is Section, excuse
15 me, Section 5, could Ms. Harris clarify for the record
16 whether that list of exhibits which is on pages 4 and 5 of
17 the petitioner's letter reference the health analysis or
18 Dr. Chase's report?
19 MS. HARRIS: I believe Mr., if I recall correctly
20 but I need to study the exhibit list, that Mr. -- that
21 Dr. Chase's report was actually not included in that initial
22 filing, it was included subsequently, but I need to
23 double-check that with the exhibit list. No -- well, we
24 said it was 15(b).
25 MR. ADELMAN: 15(b) is the number assigned by

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1 OZAH. It doesn't correspond to the numbering in your --
2 MS. HARRIS: Really?
3 MR. ADELMAN: -- petitioner's letter. I believe
4 that's correct.
5 MS. CORDRY: Yes. The health report and
6 Dr. Cole's report, both, I believe, were not included
7 initially in the first submission that we got.
8 MS. HARRIS: I think you meant Dr. Sullivan's.
9 MS. CORDRY: I'm sorry. Sorry, Dr. Sullivan's
10 report, yes.
11 MR. SILVERMAN: Mister.
12 MR. GROSSMAN: Mr. Sullivan.
13 MR. SILVERMAN: Mr. Sullivan.
14 MS. HARRIS: That's correct. That was --
15 MS. CORDRY: That's right, because we --
16 MS. HARRIS: Right. They were filed subsequently,
17 I believe two weeks later --
18 MS. CORDRY: Yes.
19 MS. HARRIS: -- or so, but I -- yes, but I don't
20 think the exhibit list accurately reflects that, I might, I
21 would note.
22 MR. ADELMAN: I want to be clear. The exhibit
23 list in the petitioner's letter does not reference the
24 health analysis or Dr. Chase's report. Is your answer yes?
25 MR. GROSSMAN: I don't understand that question.

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1 The exhibit list reflects Dr. Chase's report, Exhibit 15(b).
2 MR. ADELMAN: I'm talking about the petitioner's
3 letter, OZAH -- OZAH No. 3.
4 MR. GROSSMAN: Okay.
5 MR. ADELMAN: That letter -- I don't have the date
6 of filing; it was filed at the very beginning of the
7 process -- and that letter on page 4 and 5 has a list of
8 exhibits which were numbered by the applicant --
9 MR. GROSSMAN: Okay.
10 MR. ADELMAN: -- and the question is, does that
11 list of exhibits -- I don't see it; so I presume the answer
12 is no -- the question is, does that list of exhibits
13 specifically list the health analysis or Dr. Chase's report?
14 MR. GROSSMAN: Okay. What difference does it
15 make, by the way, if that letter, in your mind, if that
16 letter specifically lists the health report from Dr. Chase?
17 MR. ADELMAN: It's my understanding that the
18 listing of exhibits is a statement by the petitioner of
19 substantive matters which will be brought to these hearings.
20 MR. GROSSMAN: Yes, but they were -- whether or
21 not they were included in the initial listing, in their
22 initial filing, it was produced within a reasonable time
23 thereafter. What difference would it make if it was --
24 MR. ADELMAN: It was actually produced at the same
25 time as Petitioner's letter. It --

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1 MR. GROSSMAN: Okay.
2 MR. ADELMAN: -- wasn't called out in the
3 petitioner's letter, and I'm trying to establish why or how
4 that occurred.
5 MR. GROSSMAN: And what difference does it make?
6 That's my question to you.
7 MR. ADELMAN: I believe it goes to the question on
8 the importance which the applicant attached to Dr. Chase's
9 report or the health analysis.
10 MR. GROSSMAN: And what difference does that make?
11 I don't understand, at this point, having -- it all having
12 been filed, what difference does it make to --
13 MR. ADELMAN: I guess, I guess I'll have to try
14 and --
15 MR. GROSSMAN: -- to that aspect for anything that
16 would be before me?
17 MR. ADELMAN: I guess I'll have to try and make
18 that point in my testimony, Mr. Grossman.
19 MR. GROSSMAN: All right.
20 MR. ADELMAN: I want to thank Ms. Harris for
21 providing the exhibit -- I'm sorry, I don't have a number
22 for it -- the map with the precise number of parking spaces.
23 That was very helpful. Thank you.
24 MS. HARRIS: You're welcome.
25 MR. ADELMAN: And then, lastly, this is a

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1 document. I'm not going to hand out the entire document,
2 just an abbreviated version. Let's see. Could you pass
3 those around? Let's see --
4 MS. ROSENFELD: Yes.
5 MR. ADELMAN: -- I guess Mr. Grossman should get
6 one. This is just for clarification. This is a 20-page
7 document. I have simply submitted four of the pages. This
8 is a brochure which I believe was distributed at a Costco
9 open house, I'm not sure, and I just want Ms. Harris, if
10 possible, to confirm that the parking space numbers which
11 are referred to in this document were in fact the parking
12 spaces that pertain to the previous special exception;
13 that's S-2794 and not S-2863. Am I correct?
14 MS. HARRIS: Well, I would note that the gas
15 station is in a different location here. In terms of the
16 specific, the parking space numbers that are indicated on
17 there, I would need to go back and research the origins of
18 those.
19 MR. GROSSMAN: As I recall from what you, what you
20 filed recently in terms of the parking, the gas station was
21 also in the old location on that, on that little map.
22 MS. HARRIS: Right.
23 MR. BRANN: On the lease map, that is correct,
24 because that was --
25 MR. GROSSMAN: Right.

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1 MR. BRANN: -- that was done back in 2010.
2 MR. GROSSMAN: Right. But in any event, all
3 right --
4 MR. ADELMAN: So --
5 MR. GROSSMAN: -- to answer your question, she
6 doesn't know without going back over it.
7 MR. ADELMAN: Okay. Are you assigning that an
8 exhibit number? I'm sorry, I lost my train of thought.
9 MR. GROSSMAN: Is it something you're proffering
10 as an exhibit here? Or I thought this was just clarifying
11 your understanding of what was in before.
12 MR. ADELMAN: I guess I am. I --
13 MR. GROSSMAN: Okay. All right. So we'll give it
14 an exhibit number, Exhibit 266.
15 (Exhibit No. 266 was marked
16 for identification.)
17 MR. ADELMAN: And since Ms. Harris is going to
18 look into it, could she, if possible, define a source? Am I
19 correct that it was at an open house? Can I have the date,
20 if that's possible?
21 MR. BRANN: This was something that was put
22 together by Westfield.
23 MR. ADELMAN: Oh.
24 MR. BRANN: It was put together by Westfield
25 Corporation. I don't know the exact date --

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1 MR. ADELMAN: Westfield, okay.
2 MR. BRANN: -- but this was a marketing package
3 they put together in order to entice other tenants to come
4 to the center.
5 MR. ADELMAN: So it's not a, not a Costco
6 document?
7 MR. BRANN: It's not a Costco document.
8 MS. CORDRY: Okay, but that --
9 MR. ADELMAN: Okay, thank you. Thank you.
10 MS. CORDRY: -- but that was one of the ones,
11 though, that was distributed at one of the couple big open
12 meetings we had, I believe.
13 MR. BRANN: That's very possible.
14 MS. HARRIS: I think it was the one Jim Agliata
15 was at.
16 MS. CORDRY: I can probably find on here which one
17 it was.
18 MR. GROSSMAN: Your question about this is in
19 reference to parking spaces?
20 MR. ADELMAN: To clarify that the number of
21 parking spaces in this document is in fact, how I'd say
22 this, that the numbers proffered in this document are not
23 proffered in terms of S-2863 but were proffered in terms of
24 S-2794. I just want to be sure about that.
25 MS. HARRIS: Mr. Grossman, what we submitted most

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1 recently reflects the number of spaces as we currently know
2 them. I'm not so sure --
3 MR. GROSSMAN: Right.
4 MS. HARRIS: -- it's a good use of my time to
5 figure out what this reflected. I'm not sure on the intent.
6 MR. GROSSMAN: Dr. Adelman.
7 MR. ADELMAN: Well, okay, so --
8 MR. GROSSMAN: All right.
9 MR. ADELMAN: -- so long as I'm, we're all clear
10 that the numbers on this -- I'm sorry, I don't have the
11 exhibit number -- on this map with the handwritten numbers
12 is the correct --
13 MR. GROSSMAN: You're talking about the one that
14 was just --
15 MR. ADELMAN: Was just received.
16 MR. GROSSMAN: -- was recently submitted? That
17 would be Exhibit --
18 MS. CORDRY: Karen Cordry. I would note that I
19 have it listed in my records as a presentation that has a
20 file name on it of 2011 dash 0907 Wheaton Neighborhood
21 Presentation, so that --
22 MR. GROSSMAN: You're talking about --
23 MS. CORDRY: -- that particular --
24 MR. GROSSMAN: -- Exhibit 266?
25 MS. CORDRY: Yes, the one we're just discussing

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1 right now.
2 MR. GROSSMAN: All right. And --
3 MS. CORDRY: That looks like a September 2011
4 document, looks like.
5 MR. GROSSMAN: All right. And, Dr. Adelman,
6 249(a) is the exhibit number of the plan delineating
7 Costco's parking field located to the west of the Costco
8 warehouse.
9 MR. ADELMAN: Then I understand Ms. Harris's time
10 constraints, and if the numbers in 249(a) are the precise
11 ones, then there's no need for her to do any research on
12 Exhibit 266. I understand what it is. Is that okay?
13 MR. GROSSMAN: Okay.
14 MR. SILVERMAN: On that point --
15 MR. GROSSMAN: Yes, Mr. Silverman.
16 MR. SILVERMAN: -- I know you can't revisit
17 previous regulatory actions, but there was a regulatory
18 action in connection with parking.
19 MR. GROSSMAN: What do you mean by a regulatory
20 action? What are you talking --
21 MR. SILVERMAN: Let's say the applicant went
22 before, I think, the --
23 MS. ADELMAN: The committee.
24 MR. SILVERMAN: Got parking -- permission for
25 their parking plan, and what they got permission for, I

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1 think, is not, not the same as what we have before us today.
2 I just wanted to make that point.
3 MR. GROSSMAN: Well, when you say before us today,
4 are you talking about Exhibit 266 or are you talking about
5 249?
6 MR. SILVERMAN: The newest one, the one that --
7 MS. ADELMAN: 249.
8 MR. ADELMAN: 249?
9 MR. SILVERMAN: 249.
10 MR. GROSSMAN: 249(a)?
11 MR. SILVERMAN: Yes.
12 MR. ADELMAN: 249(a)?
13 MR. SILVERMAN: Yes.
14 MR. GROSSMAN: I'm sorry. So, just so I
15 understand what you're saying and so we all understand what
16 you're saying, you're saying that -- forget about 266
17 because I --
18 MR. SILVERMAN: Right.
19 MR. GROSSMAN: -- I don't know that this has any
20 bearing on what we have before us -- so you're saying that
21 there was a prior ruling on parking by an administrative
22 agency?
23 MR. SILVERMAN: Yes.
24 MR. GROSSMAN: And what administrative agency is
25 this?

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1 MS. ADELMAN: Department of Permitting --
2 MS. CORDRY: Permitting Services.
3 MR. BRANN: DPS.
4 MR. SILVERMAN: DPS.
5 MS. ADELMAN: DPS, right.
6 MR. GROSSMAN: All right.
7 MS. ADELMAN: And it was on a request for a
8 reduction in parking spaces throughout the Westfield Mall,
9 Wheaton Westfield Mall.
10 MR. GROSSMAN: A request by whom, to whom?
11 MS. ADELMAN: By --
12 MS. CORDRY: Westfield.
13 MS. ADELMAN: -- I believe it's Westfield.
14 MR. GROSSMAN: Okay. So Westfield requested a
15 reduction in the number of parking spaces that they were
16 required to supply?
17 MR. SILVERMAN: Yes.
18 MS. CORDRY: Correct.
19 MR. GROSSMAN: All right. And you're saying that
20 249(a) reflects a different number than DPS ruled was the
21 minimum amount they could supply? Is that what you're
22 saying?
23 MR. SILVERMAN: That's my understanding, yes, sir.
24 MR. GROSSMAN: Okay. And is that DPS ruling in
25 the record thus far?

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1 MR. SILVERMAN: In the record of this proceeding?
2 MR. GROSSMAN: Yes.
3 MR. SILVERMAN: No, but we could put it in there.
4 MR. GROSSMAN: All right.
5 MS. HARRIS: Actually, Mr. Grossman, I think it
6 may be.
7 MR. ADELMAN: I believe we filed it.
8 MR. SILVERMAN: Yes, we did?
9 MR. ADELMAN: I think we did. Didn't we file it?
10 MS. ADELMAN: I think it is in there.
11 MR. ADELMAN: I believe we filed it, Mr. Grossman.
12 MR. GROSSMAN: Okay.
13 MR. SILVERMAN: Sorry.
14 MR. ADELMAN: Hold on a second.
15 MS. CORDRY: So we can put it in --
16 MR. GROSSMAN: So, just so we, in terms of the
17 numbers, because I don't have those in front of me, what did
18 DPS say was the minimum number of parking spaces that should
19 be supplied? Well, Mr. Brann, let me get theirs and I'll
20 get your response in a second. Yes.
21 MS. CORDRY: It asked for a reduction of four
22 spaces per thousand square feet, which they calculated out
23 to be 6,080, 6,079 -- I think I've seen two -- but give or
24 take one, 6,080 spaces for the mall as a whole, which also
25 includes the WMATA garage and the parking garages and --

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1 MS. ADELMAN: And the office.
2 MS. CORDRY: -- and the office space.
3 MR. ADELMAN: And this --
4 MS. CORDRY: So for that entire space, it was
5 6,080 spaces, was the actual number that they were --
6 MR. GROSSMAN: When you say for that entire, for
7 what entire area?
8 MS. ADELMAN: For Wheaton Plaza.
9 MS. CORDRY: Essentially, the entire mall parcel
10 there. I could --
11 MR. GROSSMAN: The entire mall --
12 MS. CORDRY: Let me just show you.
13 MR. GROSSMAN: -- all of Wheaton Plaza or --
14 MS. ADELMAN: Yes.
15 MS. CORDRY: It includes all of the spaces here,
16 includes the WMATA garage spaces, includes the spaces over
17 by the office building, spaces back here, the spaces in this
18 garage. All of this area here was 6,080 parking --
19 MR. GROSSMAN: Okay. And then just for the
20 clarity of the record --
21 MS. CORDRY: And also --
22 MR. GROSSMAN: -- when you say all of the spaces
23 here, you're pointing throughout the entire mall.
24 MS. CORDRY: Right. And I would say there's a
25 dotted red line here that was on here, and --

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1 MR. GROSSMAN: Well, let's just, what exhibit are
2 you referring to here?
3 MR. ADELMAN: This is Exhibit 90(c).
4 MR. GROSSMAN: One at a time.
5 MR. ADELMAN: Oh, sorry.
6 MS. CORDRY: This particular exhibit I'm pointing
7 to is 159.
8 MR. GROSSMAN: 159? Is there a -- just 159, no
9 letter?
10 MS. CORDRY: No. No.
11 MR. GROSSMAN: Okay.
12 MS. CORDRY: And I would also note that also
13 included that there were spaces on the ring road, a certain
14 number of spaces referred to as being on the ring road.
15 That's also including that 6,080 spaces.
16 MR. GROSSMAN: Okay. So that includes --
17 MS. ADELMAN: And that number is a reduced number.
18 MR. GROSSMAN: Hold on one second.
19 MS. CORDRY: Right.
20 MR. GROSSMAN: That includes the WMATA garage --
21 MS. CORDRY: What I'll call the Penney's garage.
22 It's also the garage used for the Costco east parking
23 spaces.
24 MR. GROSSMAN: -- all garages, lots, and ring
25 road.

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1 MS. CORDRY: Correct, and that was a reduction
2 from the previous number. I believe it was listed as being
3 6,428.
4 MR. GROSSMAN: Okay. Now -- all right.
5 MR. ADELMAN: Mr. Grossman, that was filed. It is
6 in your list.
7 MR. GROSSMAN: And what is the exhibit number?
8 MR. ADELMAN: It's 90(c).
9 MR. GROSSMAN: Exhibit 90(c) is the DPS ruling?
10 MR. ADELMAN: There were three items. One of them
11 is the Westfield Parking Space Waiver, which is your Item,
12 Exhibit 90(c).
13 MR. GROSSMAN: Okay. Mr. Brann, did you want to
14 respond to that?
15 MR. BRANN: The exhibit that we submitted that
16 showed the overall parking for the mall clearly states there
17 are 6,072 parking spaces provided. It puts the mall parcel
18 at 4.01 per thousand square feet. At 4.0 per thousand
19 square feet, which is the variance that was granted by DPS,
20 there's a necessary number of 5,998 parking spaces.
21 MS. CORDRY: Well, I believe the DPS waiver also
22 did in terms of specific numbers of spaces, because -- in
23 any case, we can look back at that and --
24 MR. GROSSMAN: Okay.
25 MS. CORDRY: -- perhaps deal with that later, but

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1 I believe it was not just the 4.0. I believe it was also a
2 specific calculation of the number of spaces there.
3 MR. GROSSMAN: Okay. Well, I'm not sure why that
4 issue is in front of me right at this second. That's --
5 MS. CORDRY: I'm not sure either, but in terms of
6 that --
7 MR. GROSSMAN: Dr. Adelman, why are we raising
8 this issue right now? Why are we getting into the parking
9 question now?
10 MR. ADELMAN: That was Mr. --
11 MR. SILVERMAN: Silverman.
12 MR. ADELMAN: Thank you.
13 MR. SILVERMAN: Yes. Yes, I'm just -- you know,
14 the case shifts. You've indicated, not so much with the
15 parking, but with other aspects of the case that a previous
16 DPS ruling or other administrative ruling you're bound by
17 it, but I'm just trying to understand it. I don't really
18 know because I did not anticipate this discussion this
19 morning, but I'm just trying to understand whether the
20 parking waiver is still the same parking -- that the
21 situation that it addresses is still the same situation
22 under these new, new designs, which are different from the
23 old designs.
24 MR. GROSSMAN: All right. Well, I think they've
25 supplied the exhibit showing what their idea is of the

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1 number of parking spaces that will be allocated to Costco,
2 and I don't think we have to elucidate this any further --
3 MR. SILVERMAN: No. That's fine.
4 MR. GROSSMAN: -- at this junction. If you have a
5 point to make in your case, you can make it in your case.
6 MR. SILVERMAN: Thank you.
7 MR. GROSSMAN: All right. Any other preliminary
8 matters?
9 MR. SILVERMAN: With regard to producing documents
10 in advance, your interesting question about standards, I may
11 require some documents, although most of it is cases and
12 regulations, the statute, but I'll try to be as courteous as
13 I can in providing documents to you and to others to make it
14 easy. And, secondly, I may also provide a list of just a
15 short outline of topics I intend to address in my own
16 testimony --
17 MR. GROSSMAN: Okay. That will be nice.
18 MR. SILVERMAN: -- give that in advance. There's
19 one other thing, which is --
20 MR. GROSSMAN: Yes.
21 MR. SILVERMAN: -- could probably throw me out for
22 being tangential, but we keep a very close eye on activities
23 at Costco and, you know, wonder to ourselves whether it may
24 be appropriate to raise sort of general poor housekeeping
25 with regard to chemicals as a part of our opposition. We

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1 don't know that we're going to do that, but one of the
2 observations that we've made, I think Ms. Cordry made, was a
3 slurry of unknown substances going, emanating from the
4 Costco area. And I just, normally I would just call
5 Mr. Brann, but since we're sort of in an adversarial
6 litigation posture, I just wanted to raise it and tell you
7 we had a sample, and maybe you can get back to us on the
8 answer.
9 MR. GROSSMAN: I don't understand what you're
10 raising. First of all, is this a preliminary matter of
11 something procedural that ought to be addressed prior to the
12 hearing today?
13 MR. SILVERMAN: It would be helpful to us. I just
14 want to communicate with Costco. Maybe I should talk to
15 Ms. Harris directly.
16 MR. GROSSMAN: Is there anything before me
17 regarding this?
18 MR. SILVERMAN: Not yet, no.
19 MR. GROSSMAN: No, I mean, what is it that you're
20 suggesting would be before me in this? I don't understand.
21 MR. SILVERMAN: There seems to be an environmental
22 problem at the site which suggests poor housekeeping and
23 that may be relevant when we make our case.
24 MR. GROSSMAN: You're saying there seems to be a
25 problem in the Costco warehouse?

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1 MR. SILVERMAN: Yes.
2 MR. GROSSMAN: That's somehow relevant to whether
3 or not they'd be permitted to --
4 MR. SILVERMAN: It's outside, stormwater problems.
5 There've been a number of stormwater problems. I just want
6 to, I just want to get some clarification on it. And I
7 think it is relevant because, if people can't handle simple
8 matters, it's harder -- it suggests there may be a problem
9 handling more complex matters like gasoline.
10 MR. GROSSMAN: I don't see that as a preliminary
11 matter to this hearing.
12 MR. SILVERMAN: I apologize.
13 MR. GROSSMAN: If you have something that you want
14 to bring up in your case, you can bring it up, and then if
15 there's an objection, I'll rule on it as an objection. I
16 don't see that as a either procedural or a substantive
17 matter that's before me now --
18 MR. SILVERMAN: Fair enough.
19 MR. GROSSMAN: -- at this point.
20 MR. BRANN: Can I make a quick suggestion on that?
21 MR. GROSSMAN: Yes, Mr. Brann.
22 MR. BRANN: We've not received any complaints at
23 the warehouse about any of these things. If you have an
24 issue with the way the warehouse is operated, the correct
25 person to contact is Pat Fahey, the manager of the

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1 warehouse. His last name is spelled F-A-Y, I'm sorry,
2 F-A-H-E-Y, Pat Fahey. He's the person to contact about
3 that. He's the person --
4 MR. SILVERMAN: And we can do that directly?
5 MR. BRANN: What's that?
6 MR. SILVERMAN: We can do that directly, not
7 through Ms. Harris?
8 MR. BRANN: You could do that directly. Anyone --
9 MR. SILVERMAN: Okay.
10 MR. BRANN: -- can contact Mr. Fahey directly --
11 MR. SILVERMAN: Thank you.
12 MR. BRANN: -- if you have an issue with the way
13 the warehouse is being run.
14 MR. SILVERMAN: Thank you.
15 MR. GROSSMAN: I mean, I'm not the ombudsman
16 over --
17 MR. SILVERMAN: I understand.
18 MR. GROSSMAN: -- how Costco warehouse functions,
19 and it's not anything before me, so really should not be
20 addressing that, Mr. Silverman. All right. Having handled
21 the preliminary, in quotes, matters, let's turn to the
22 additional witnesses. Ms. Harris.
23 MS. HARRIS: Thank you. The next witness we will
24 be calling is Mr. Mark Willard, the landscape architect.
25 MR. GROSSMAN: All right, Mr. Willard. Would you

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1 have a seat up there, please?
2 MR. WILLARD: Okay.
3 MR. GROSSMAN: Would you state your full name,
4 please?
5 MR. WILLARD: Yeah. My name is Mark A. Willard.
6 MR. GROSSMAN: All right. Raise your right hand,
7 please.
8 (Witness sworn.)
9 MR. GROSSMAN: All right. You may proceed,
10 Ms. Harris.
11 MS. HARRIS: Thank you.
12 DIRECT EXAMINATION
13 BY MS. HARRIS:
14 Q Mr. Willard, can you please introduce yourself to
15 Mr. Grossman and tell him where you're currently employed?
16 A Sure. As I said, my name is Mark Willard. I am a
17 registered landscape architect. I have my own company, Mark
18 Willard & Associates, LLC, and I've been practicing
19 landscape architecture for 30 years, and I've had my own
20 business now for about 14.
21 Q And can you describe some of the types of
22 landscaping projects that you, that Mark Willard &
23 Associates works on?
24 A Sure. Yeah. We work on a variety of project
25 types. We do a lot of residential design work. We do some

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1 commercial design work, probably a 75/25 percent mix.
2 Commercial work varies from institutional to shopping
3 centers, some international work occasionally, but --
4 Q Yes. And where did you go to school?
5 A Penn State University.
6 Q And are you licensed as a landscape architect in
7 the State of Maryland?
8 A Yes.
9 Q And have you ever testified as an expert in land
10 planning before a board in Maryland?
11 A Yes. It was a long time ago, though.
12 Q And how long ago?
13 A About 15 years ago.
14 Q And what board was that or where was it?
15 A It was in Baltimore County, and it was a zoning
16 hearing for a restaurant.
17 Q Thank you.
18 MS. HARRIS: Mr. Willard's résumé is in the record
19 as Exhibit 17(d), and --
20 MR. GROSSMAN: Yes.
21 MS. HARRIS: -- I'd like to request that he be
22 considered an expert in the field of landscape architecture.
23 MR. GROSSMAN: All right. Any questions regarding
24 this witness's qualifications?
25 MS. ROSENFELD: Not from Kensington Heights.

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1 MR. GROSSMAN: Anybody else?
2 MS. ADELMAN: No.
3 MR. GROSSMAN: All right. Based on Mr. Willard's
4 testimony describing his operation and his résumé, Exhibit
5 17(d), I accept him as an expert in landscape architecture.
6 MS. HARRIS: Thank you.
7 BY MS. HARRIS:
8 Q Did Costco hire Mark Willard & Associates to work
9 at the Wheaton Mall?
10 A Yes.
11 Q And can you please describe what your role was --
12 A Yes.
13 Q -- with respect to that?
14 A We've been hired by Costco to prepare planting
15 plans in conjunction with the civil engineers and the
16 architects that have been hired to do the special exception
17 construction of the gas station and the perimeter wall, the
18 screen wall.
19 Q So did your work focus within the special
20 exception area?
21 A Yes. It was actually broken down into two
22 projects. We have focused on the planting of the special
23 exception area, which is shown here in the southwest
24 quadrant of the Costco parking lot.
25 MR. GROSSMAN: All right. Mr. Willard, since

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1 you're referring to something, what is the diagram you're
2 referring to now?
3 MS. HARRIS: And I would note that this is Exhibit
4 265(d) in the record.
5 MR. GROSSMAN: Okay.
6 MS. HARRIS: It's the landscape master plan.
7 THE WITNESS: Okay. So, yes, on this exhibit it
8 clearly shows the special exception area for the gas station
9 which has planting plans done for it and then also planting
10 to buffer the residential, adjacent residential properties
11 from the proposed construction.
12 BY MS. HARRIS:
13 Q Thank you. And then were you also responsible in
14 connection with the scaping for the, landscaping shown on
15 Exhibit 265(d) with respect to the area west of the special
16 exception area?
17 A Yes. Actually, this area, this parking lot area
18 was work that we did in conjunction with -- I'm doing work
19 for Wheaton Mall, actually.
20 Q Okay, thank you. When you say you're doing work
21 for Wheaton Mall, can you elaborate on that?
22 A Yeah. Our client in that case is the mall, not
23 Costco.
24 Q Okay, thank you. And when you said this area,
25 you're referring to what area? Can you -- the southwest

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1 corner?
2 A Yes, the southwest corner of the parking lot here.
3 Q Thank you.
4 A North is to the top of sheet, of course; south is
5 to the bottom, east, west.
6 Q Okay, thank you. And are you familiar with the
7 2012 Wheaton Sector Plan?
8 A Yes.
9 Q And are you aware that the sector plan identifies
10 a green buffer area on the mall --
11 A Yes. Yeah.
12 Q -- parcel? And can you please identify where
13 that's located?
14 A Yeah. That -- it's essentially the southern
15 border of the property here and turns the corner and goes up
16 the western corner here. That's the part that's included on
17 this drawing.
18 Q Okay. And can you describe what currently exists
19 within that area in terms of vegetative materials?
20 A Sure, primarily deciduous canopy, some
21 regenerating understory, there is some evergreen trees,
22 quite large evergreen trees, actually, in this area, white
23 pine. The majority of the vegetation on the southern border
24 is deciduous, some larger trees, a lot of small trees.
25 Q And how would you describe the quality of the

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1 existing trees?
2 A Fair, fair quality.
3 Q Okay. And what landscaping is proposed in
4 connection with the filling station within the special
5 exception area itself? And if need be, you can refer to
6 other plans.
7 A Sure. Within the special exception area, which is
8 here, there are some parking lot trees to the north side of
9 the special exception area. There are two bioretention
10 basins on the south side of the special exception area.
11 There's actually some more trees captured here, as well,
12 inside the special exception area.
13 Q And do the bioretention areas have landscaping
14 within them?
15 A Yes, and they're basically designed to filter
16 water as part of the stormwater management system.
17 Q Can you briefly describe how the landscaping has,
18 how the current plan that's in the record has changed from
19 the previous plans?
20 A Okay, sure.
21 Q And right now we're just focusing on within the
22 special exception area.
23 A Okay. There's only two things that have changed
24 as part of the August 1st and August -- actually, August 1st
25 set of plans. The configuration of this parking island

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1 changed somewhat to accommodate some truck traffic, and the
2 area of these two islands were reshaped somewhat so it was
3 the same area of green space. So we modified the quantity
4 and the location of the plants within those islands to
5 accommodate that new shape. It was very minor.
6 MR. GROSSMAN: These are the islands on the south
7 side of the special exception area itself?
8 THE WITNESS: That's correct.
9 MR. GROSSMAN: Okay.
10 BY MS. HARRIS:
11 Q Did the actual types of plantings change --
12 A No.
13 Q -- within those areas?
14 A No.
15 Q Okay.
16 A There was also a small exhibit that was done by
17 the civil engineer and traffic consultant about sight
18 distance as someone was exiting the parking lot in that
19 location, and it was determined that there were some shrubs
20 that could possibly be a sight-distance issue. We moved
21 those back slightly on the August 1st set of plans as well,
22 so those two changes.
23 Q Thank you. And then please describe the
24 landscaping proposed for that area of the mall site, which
25 is outside the special exception area.

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1 A The buffer area, the green buffer area?
2 Q Yes, correct.
3 A Sure. What we proposed to do is plant a mix of
4 evergreen, some deciduous, but mostly evergreen native trees
5 along the top edge of the existing green buffer in this
6 location. There's a stream buffer --
7 MR. GROSSMAN: You say in this location. Just so
8 the record reflects --
9 THE WITNESS: I'm sorry, the west side of the
10 green buffer. In the very southwest corner of the green
11 buffer, there's a stream buffer. There's only a few trees
12 planted where the, where there was some previous disturbance
13 created by some work that was done by Wheaton Mall. We were
14 directed by Parks and Planning to focus our planting for
15 that area in this location. And on the south side of the
16 green buffer, there's, again, more evergreen trees, mixed in
17 sizes, some flowering trees -- they're planted in a very
18 natural way -- and there's a small area that's open,
19 existing, where there's a future project, I understand,
20 planned here. There's really very little existing green
21 buffer in this area; so we proposed to heavy it up with
22 larger evergreen trees and flowering trees and try and keep
23 some visual screening and soften the view of the wall as you
24 look at it from the, from the south and to the west.
25 MR. GROSSMAN: You referred to the west side of

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1 the green buffer before. I think you -- it's really the
2 east side of the green buffer, correct, but it's the west
3 side of the mall?
4 THE WITNESS: That's correct.
5 MR. GROSSMAN: Okay.
6 THE WITNESS: You're right. That's right.
7 BY MS. HARRIS:
8 Q Can you describe what changes were made within
9 that green area as a result of comments received by Park and
10 Planning staff?
11 A Yes. Yeah. There were two series of changes made
12 in the month of August, in July, late July and August.
13 MR. GROSSMAN: Of 2013.
14 THE WITNESS: Of 2013. The first set of changes
15 primarily had to do with limiting the proposed planting in
16 the stream buffer area to just the existing disturbed area.
17 So the trees that you see from this location over the south
18 side or the north side of the green buffer, south of the
19 special exception area, and the east side of the green
20 buffer, west of the special exception area, those are
21 essentially the same tree locations as we have on the
22 previous plans. Of course, the sidewalk is now proposed on
23 the other side of the wall --
24 BY MS. HARRIS:
25 Q Yes.

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1 A -- and the location of the wall, location of the
2 sidewalk, we simply bring that information in from the civil
3 engineer's drawings and update our plans accordingly.
4 Q Did the size of the trees change?
5 A Yes, as -- which was the reason we changed the
6 plans later in the month of August. I was trying to keep
7 larger trees, but yes, they changed to the smaller sizes.
8 Q And the reason for that?
9 A Parks and Planning wanted us to plant smaller
10 plant material because the amount of grading that would be
11 required to plant a tree on a slope would be less
12 disturbance, and they weren't comfortable with planting the
13 larger-size trees that we had proposed because, when you
14 plant a root ball in a slope, the root ball has to be
15 planted flat and, if you're on a slope, you got to cut above
16 it and you got to fill below it. The larger the tree, the
17 more grading has to be done to support that tree; the
18 smaller the plant, the less that cut and fill has to be
19 done, and the Parks and Planning people felt they wanted to
20 use smaller material. So we changed the sizes of the
21 hollies, all the evergreen trees. They were 10- to 12-size
22 trees, down to six and eight foot high, and all of the
23 three-inch caliber canopy trees were changed to
24 one-and-a-half-inch caliber.
25 Q Thank you. Does the zoning ordinance require

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1 additional planting or buffering in connection with the
2 special exception?
3 A Well, technically, no, because the special
4 exception area doesn't abut the residential properties. The
5 parking lot does, the Wheaton Mall property --
6 Q Yes.
7 A -- does. However, part of our scope has been all
8 along to try and find ways to -- and you can see, the blue
9 color here is the viewshed from the existing houses -- so
10 very early on we tried to address where the viewsheds from
11 houses were and how could we buffer that view of the gas
12 station canopy structure located within the special
13 exception area as, as efficiently as possible.
14 Q And so what was the result of trying to enhance
15 that buffer?
16 A With clustering native evergreen trees up at the
17 very top of the hill along the eastern side of the green
18 buffer on the western portion of the property, and on the
19 northern edge of the green buffer on the southern side of
20 the special exception area.
21 Q Okay. And I want to turn now to the screen wall.
22 Can you --
23 A Okay.
24 Q -- please describe where it's located, where it
25 starts and stops? And you can refer to Exhibit 265(d).

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1 A Sure. The screen wall, eight foot high, starts
2 approximately due west of the canopy of the special -- of
3 the gas station canopy, right behind the curb line, and
4 continues parallel immediately adjacent to the curb,
5 slightly behind it, all along this edge of the curb as it
6 goes along the southern part of the ring road and stops
7 approximately right here, immediately south of the loading
8 dock area of the Costco store.
9 Q And can you please describe the plantings that
10 will be associated with that screen wall?
11 A Yeah. We worked with the engineers and the
12 architect in designing that screen wall. They pretty much
13 came up with the idea of the wall. We suggested using
14 green-screen material on the wall, to cover it with vines,
15 and we worked with Parks and Planning and the list that they
16 gave us of native vines that are non-invasive that would be
17 acceptable to them to grow on the list, and we proposed an
18 American Bittersweet to be grown on the front of the wall
19 and the back of the wall.
20 Q Okay. And how was the location and height of the
21 screen wall determined, and did you have any participation
22 in that?
23 A No, I really didn't have participation in it, but
24 my understanding was that it sort of evolved. There was one
25 time where we did adjust the length of it to accommodate a

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1 view from a townhouse, I think in this location. Something
2 was brought up at a community meeting by one of the
3 neighbors, one of the many open houses that Costco made all
4 their consultants available for the community, and someone
5 raised a question. They could see, I think, the canopy from
6 this second-floor house. So we did extend the wall, I'm not
7 sure exactly the distance, but in this area to block that
8 view.
9 Q Okay, thank you. I want to turn now to the sector
10 plan, briefly.
11 A Okay.
12 Q What sector plan recommendations related to the --
13 which relate to the landscaping are applicable to the sector
14 plan? And if need be, you can refer to the actual sector
15 plan pages.
16 A Well, I think there's three that come to mind
17 right away: the fact that we preserve the green buffer that
18 exists, that we increase the tree canopy as much as we can,
19 and that we use native species whenever we are planting
20 within the green buffer area.
21 Q And so in your opinion, does the special
22 exception, it's consistent with the recommendations of --
23 A Yes.
24 Q -- the sector plan in connection with landscaping?
25 A Yes.

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1 Q And have you reviewed the sector plan design
2 guidelines pertaining to landscaping?
3 A I think I did cursory review those, yes.
4 Q And are you aware that they also talk about
5 preservation of the open green buffer?
6 A Yes. Yes.
7 Q And in your opinion, does the special exception
8 application further that goal?
9 A Yes.
10 Q Thank you.
11 MS. HARRIS: I have no further questions for
12 Mr. Willard.
13 MR. GROSSMAN: All right, cross-examination.
14 Who'd like to begin? Dr. Adelman.
15 MR. ADELMAN: Yes.
16 CROSS-EXAMINATION
17 BY MR. ADELMAN:
18 Q Mr. Willard, thank you. I have a couple of
19 questions primarily about the plantings on the southern side
20 of the fence, the outside, that point of interface with the
21 forest buffer.
22 A Uh-huh.
23 Q First of all, you are a landscape design expert,
24 is that correct?
25 A Yes.

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1 Q Will you be involved in the actual planting of
2 trees, shrubs, et cetera, or will that be --
3 A No.
4 Q Will you have any role in advising whoever is
5 hired to do the planting as to the proper procedure?
6 A Normally we will, but the way my scope currently
7 is outlined, I haven't been asked to do that.
8 Q Okay. You said, I believe, that there would be
9 several -- there would be some large trees and some small
10 trees along the exterior of the fence, is that correct?
11 A I think I, I think I said the existing green
12 buffer was made up of some large-specimen trees and smaller
13 trees.
14 Q Will there be some small trees and some large
15 trees planted, or have you advised that?
16 A Well, Parks and Planning asked me to reduce the
17 sizes of all the proposed trees now. So I wouldn't call
18 them all large trees anymore, but --
19 Q Fine.
20 A They will grow to be large trees in time, but the
21 initial planting is only one-and-a-half-inch caliber for
22 deciduous trees and --
23 Q Fine. I wanted to focus, if I might, on the
24 specific area that you referred to as planting in the
25 general vicinity of the screen buffer, which was, if I

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1 understood your comments, of concern to the planning staff,
2 is that correct?
3 A I'm sorry. Can you repeat the question again?
4 Q I'm sorry. You referred to planning staff's
5 recommendations that you reduce the size of trees planted,
6 particularly in the area around the screen buffer, is that
7 correct?
8 A Yes.
9 Q Are you aware of why the planning staff was
10 concerned specifically about that area?
11 A Well, the stream buffer area had -- we were only
12 allowed to plant within the disturbed area that exists.
13 Q A disturbed area?
14 A A recently disturbed area that exists, yes.
15 Q How was that area disturbed? What is the
16 disturbance?
17 A Yeah, my understanding was that there was some
18 work done on the outfall to a storm drain pipe --
19 Q Yes.
20 A -- if I can point that out on the exhibit --
21 Q Please.
22 A -- 265(b).
23 MR. GROSSMAN: Certainly.
24 THE WITNESS: On the southeast corner of the
25 property, there is a storm drain outfall approximately

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1 located within the green buffer right here --
2 BY MR. ADELMAN:
3 Q Yes.
4 A -- which hence is the point at which this stream
5 buffer line was created. And apparently some work was done,
6 which I was not involved in that work, but my understanding
7 is that's what was done, and there's some, there was a path
8 that was created to do that work --
9 Q Yes.
10 A -- and Parks and Planning asked that the only
11 planting that we plant within the stream buffer zone occur
12 in that disturbed area, that we not disturb anything in the
13 stream buffer outside of that disturbed --
14 Q So the, quote, disturbed area is around the
15 stormwater outfall, is that correct, to your understanding?
16 A There and leading to it from outside, the access
17 for the construction equipment to get there.
18 Q All right. I want to focus on that, but I also
19 want to broaden this to the general question of the size of
20 trees that will be planted, and in your opinion, in your
21 expert opinion, how will they be planted? To be explicit,
22 will those trees be brought in by some sort of mechanical
23 device up the slope to the fence, or would one use some sort
24 of a derrick and reach under the fence and plant them from
25 the inside?

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1 A No, it specifically states on our documents that
2 there will be no mechanical equipment used to disturb any
3 trees in the forest -- in the existing green buffer area.
4 Q So any trees planted would, in your opinion, be
5 planted -- they would be carried by hand?
6 A That's correct and that's very commonly done.
7 MR. ADELMAN: Mr. Grossman, this may raise -- this
8 may come as hearsay; so I'm not sure how to phrase the
9 question. So please correct me.
10 BY MR. ADELMAN:
11 Q Are you aware that planning staff's concern about
12 the area of disturbance arises from the fact that, in the
13 case of work on the stormwater outfall, there was use of
14 mechanical devices, even though, as I understand it, from
15 planning staff's point of view, there had been an agreement
16 that no mechanical devices would be used?
17 A Yeah, I'm not aware of what the agreements were
18 for that project without -- who did the work and --
19 Q Okay.
20 A -- what the scope of work was. I wasn't part of
21 that event.
22 Q In your expert opinion, you would strongly
23 recommend -- and that would be consistent with planning
24 staff's concerns -- that any trees planted be carried in by
25 hand and planted, with no trucks, small --

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1 A Right.
2 Q -- carts, that kind of thing?
3 A Right. Right.
4 Q You, yourself, will not be supervising that, is
5 that correct?
6 A I have not been requested to do that at this
7 point, no.
8 Q And the reason -- please correct me if I'm
9 wrong -- for that stipulation is, as you said, that trees of
10 a certain size, being planted on a slope, can disturb the
11 slope which results, in principle, can result in erosion of
12 the slope and thus damage to other existing trees, is that
13 accurate?
14 A I'm not sure what the specific question is.
15 Again, can you -- what are you asking me?
16 Q Well, the specific question is, the concern for
17 the size of trees being planted in a specific area --
18 A Right.
19 Q -- am I correct or can you correct me, the reason
20 for the concern about the size is that trees of a certain
21 size or above a certain size of a planting, the planting of
22 those trees can lead to erosion of the slope and therefore
23 the root system of adjacent trees, the preexisting trees?
24 A I think you're correct in saying that's possible,
25 yes.

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1 Q Have you walked the site, so to speak? Are you
2 aware of erosion of any tree root systems?
3 A Yes, I have walked the site. I have seen some
4 erosion and some disturbance from outside of the --
5 Q And is that disturbance in the --
6 MR. GROSSMAN: He didn't finish his sentence.
7 BY MR. ADELMAN:
8 Q -- quote, disturbed area?
9 MR. GROSSMAN: Wait a second, Dr. Adelman.
10 THE WITNESS: Okay.
11 MR. ADELMAN: I'm sorry.
12 MR. GROSSMAN: He has seen --
13 THE WITNESS: Yeah.
14 MR. GROSSMAN: You have seen some erosion from
15 outside of the --
16 THE WITNESS: Yeah. I mean, when you walk in
17 there, it's a fairly -- I mean, people access that area and
18 walk through that, and you can see where there's trails
19 through the soil where people walk, where there's, you know,
20 dirt exposed.
21 MR. GROSSMAN: So the rest of your sentence was,
22 from the people walking in the area?
23 THE WITNESS: Yes. Yes.
24 MR. GROSSMAN: Okay.
25 THE WITNESS: Apologize for any --

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1 BY MR. ADELMAN:
2 Q Could you tell from your visit to the site how the
3 erosion had occurred? Could you determine or could --
4 MR. GROSSMAN: Well, that's two questions.
5 MR. ADELMAN: Ah, I'm sorry, sorry.
6 BY MR. ADELMAN:
7 Q Could you tell how the erosion had occurred?
8 A There's no way of really knowing. I just assumed
9 that it was a trail that was created by people walking
10 there.
11 Q Could it have been created by a mechanical device
12 as opposed to people?
13 A Could have been bicycles, sure. Could have been
14 anything anybody took back there.
15 Q Was there any evidence for a small cart of some
16 sort being driven through the area and up the slope?
17 A Not clear evidence that I could see.
18 MR. GROSSMAN: Where is this going, Dr. Adelman?
19 What's the relevance to me?
20 MR. ADELMAN: It's going to the issue of whether
21 or not the planting that's proposed can in fact be
22 reasonably expected to protect from damage the forest
23 buffer.
24 MR. GROSSMAN: All right.
25 BY MR. ADELMAN:

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1 Q The area of erosion that you observed, was it in
2 the immediate proximity, let's say, to be precise, within
3 five to 10 feet of the point of efflux from the stormwater
4 outfall pipe?
5 A I don't remember exactly where it was in
6 relationship to the stormwater outfall, I mean, the --
7 Q Was it within 100 yards?
8 A Yeah, 100 yards is a pretty big area.
9 Q Fifty yards?
10 A Yeah, I don't remember exactly.
11 Q If trees that you recommended be planted are
12 planted incorrectly by techniques that are not appropriate
13 and they, the planting causes erosion and damage to the root
14 system of other trees, preexisting trees, how can that be
15 mitigated or corrected?
16 A I mean, that's a situation that, you know, is a
17 possibility that could occur. I don't -- I mean, anything
18 could happen, but if they do the work in accordance to the
19 way we specified on the plans, the amount of disturbance by
20 those small trees that we're going to plant there in the
21 already-disturbed area is not going to cause any
22 disturbance --
23 Q Understood.
24 A -- but I have no way of guaranteeing what will
25 actually ever happen.

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1 Q Understood. There is no way to guarantee --
2 A Right.
3 Q -- understood. But you have observed that there
4 is already a sign of some sort of damage having been done?
5 A Yeah, and I -- who did that and how that happened
6 and how close it is to the storm drain outfall and how much
7 damage, I have no idea.
8 Q Right. And, of course, my question is not going
9 to who is to blame --
10 A Right.
11 Q -- for that damage; it's going to the question of
12 whether or not, given that damage has been done, is it
13 reasonable or unreasonable to ask, well, if damage has been
14 done because of this action, is it not plausible that other
15 damage can in fact be done? We're now talking about
16 something highly speculative.
17 A I mean, they're all what-ifs.
18 MR. GROSSMAN: I mean --
19 THE WITNESS: I mean, some trees --
20 MR. GROSSMAN: Stop for one second. I allow --
21 experts can be asked hypothetical questions, but just sort
22 of a pregnant hypothetical, I mean, and if something
23 happened --
24 MR. ADELMAN: All right.
25 MR. GROSSMAN: -- what would happen if you did, if

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1 that's -- I'm not sure how that can lead to evidence that I
2 can consider.
3 MR. ADELMAN: All right. Let me be more precise.
4 BY MR. ADELMAN:
5 Q How big are the trees, how heavy are the trees
6 that you recommended planting on the slope immediately
7 around the disturbed area and adjacent to it, how big, how
8 heavy?
9 A Well, we specify them the standard way that you
10 specify trees for a construction project, and that is, you
11 specify the caliber of the tree and the species of the tree
12 and its general condition. And a one-and-a-half-inch
13 caliber tree, weight is dependent upon is it a wet soil or
14 is it dry, but the one-and-a-half-inch caliber tree root
15 ball is typically a 24-inch diameter root ball, say.
16 There's an actual standard that you can look into to see
17 what caliber tree generates what size root ball. It depends
18 on the type of tree, the species, gets a little complicated,
19 but generally, it's --
20 Q Given your --
21 A -- it's the smallest trees you can plant that have
22 a reasonable chance of survival.
23 Q Given your expertise, you could estimate the
24 probable weight of a tree, of the tree that will be planted.
25 A Uh-huh.

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1 Q Is the tree probably too heavy for one person to
2 carry?
3 A That's possible.
4 Q Would the person bringing that tree up the slope
5 use some sort of wheelbarrow or something?
6 MR. GROSSMAN: I think you're asking him to
7 speculate here on --
8 THE WITNESS: Yeah.
9 MR. GROSSMAN: -- something. I really don't see
10 how this is -- how can I, how can I reach any sort of
11 conclusions from a speculation upon a speculation here? I
12 understand, I think you're bringing out a concern you have
13 as to what will happen when the actual plantings are made,
14 but the witness has already testified he's not been directly
15 assigned to that, but even if he had, I'm not sure he could
16 answer the kinds of question you're asking, Dr. Adelman.
17 You're asking for a speculative answer. It's going beyond
18 just a hypothetical.
19 MR. ADELMAN: With all due respect, Mr. Grossman,
20 I'm not asking for speculation. I'm asking for an expert
21 projection. Much of the evidence presented in this series
22 of hearings is projection. I'm asking the expert to project
23 in his opinion the size of the tree, the probability of
24 damage if the tree is planted improperly. That seems --
25 MR. GROSSMAN: But I think he's already --

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1 MR. ADELMAN: -- not speculation.
2 MR. GROSSMAN: He's already answered that to the
3 extent that he can. You asked him if a tree could be, might
4 be heavy enough that it would require two people to carry,
5 and he's answered that, and I just don't see where it's all
6 going from here.
7 MR. ADELMAN: Actually, you've stated very
8 concisely where it went.
9 MR. GROSSMAN: Right.
10 MR. ADELMAN: Thank you. One moment.
11 BY MR. ADELMAN:
12 Q Just to be clear, am I correct that you did state
13 that you observed erosion of the root system of one or more
14 trees in the vicinity of the stormwater outfall?
15 A I have seen obvious disturbance in that green
16 buffer area when I walked the site. Exactly where that is I
17 don't really recall, but I have seen evidence of human
18 traffic, whether it's people walking, in that area.
19 MR. ADELMAN: Okay. We have no further questions.
20 MR. GROSSMAN: All right. Kensington Heights.
21 MS. ROSENFELD: Yes.
22 CROSS-EXAMINATION
23 BY MS. ROSENFELD:
24 Q Mr. Willard, on your plan -- what exhibit number?
25 A 265(b).

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1 Q 265(b).
2 MR. GROSSMAN: Is that B or D, as in dog?
3 MS. HARRIS: I think it was D.
4 THE WITNESS: D, I apologize. You're right.
5 MR. GROSSMAN: D, as in dog, yes.
6 BY MS. ROSENFELD:
7 Q D, like dog, okay. Between the green wall and the
8 sidewalk, there is a set of parallel lines. They look kind
9 of like railroad tracks. I just don't see them on the
10 legend. Can you tell me what that reflects?
11 A There is a blue dashed line that runs along the
12 curb line --
13 Q Right.
14 A -- then on the south and western sides of the
15 existing ring road, and then there's a green dashed line.
16 Are those the lines you're referring to?
17 Q In between them there's a set of parallel lines
18 with black markings between.
19 A Okay. That's, that's the wall. That's the screen
20 wall, and the black dots represent the column locations.
21 Q Oh, okay.
22 A That runs between the blue dotted line and the
23 green.
24 Q So that's what's going to be hung on the concrete
25 panels, is that correct?

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1 A No. The black line that you're referring to is
2 sort of represented by the green dashed line as well. They
3 mean the same thing. The green line, the green dashed line
4 says that's where the screen wall is, the eight-foot high
5 green screen is proposed. The actual black and -- the
6 parallel lines with the black dots, that's the actual wall.
7 Q The black lines represent where the physical wall
8 will be placed?
9 A That's correct. The green dashed line is a
10 conceptual sort of location, general location of it.
11 Q Okay. And so the green screen will be hung on
12 either side of those black lines?
13 A Yeah. The green screen is only --
14 Q The screen that the plantings will grow up on.
15 A Yeah. There's another exhibit that has that a
16 little more clearly detailed. That would be --
17 Q And where would that be shown?
18 A That was one of the things that changed, too, on
19 the drawings, by the way.
20 (Discussion off the record.)
21 MR. GROSSMAN: Ms. Harris, did you send a copy of
22 these corrected landscape plans to technical staff, the ones
23 that have the plantings list?
24 MS. HARRIS: Electronically it was all correct --
25 MR. GROSSMAN: Oh, okay.

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1 MS. HARRIS: -- it was just that when you printed
2 out the hard copy. So my assumption, and I can clarify
3 this, is they were looking at it on their screen and could
4 see the, but --
5 MR. GROSSMAN: Make sure that they have a copy --
6 MS. ROSENFELD: I can't see anything on my screen.
7 MR. GROSSMAN: Make sure that technical staff has
8 a copy of the final landscape and screening plans with all
9 the corrections on them because that's a statutory
10 requirement that we have. That --
11 MS. HARRIS: Okay.
12 MR. GROSSMAN: -- in effect, is an amendment to
13 the plan. So --
14 MS. HARRIS: Okay.
15 MR. GROSSMAN: And, of course, it's especially
16 important if they had any commentary on it, but I --
17 MS. HARRIS: Right.
18 MR. GROSSMAN: -- I assume that from what you've
19 said that they already had that, the corrected plan, in
20 front of them visually from a, electronically, and so they
21 probably won't, but I just want to make sure that, and just
22 bring to their attention --
23 MS. HARRIS: No --
24 MR. GROSSMAN: -- that this is to conform to the
25 electronic plan they had, just so they know, because they've

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1 informed me electronically, and I put it in the record, that
2 they approved these revised landscape drawings.
3 MS. HARRIS: Certainly.
4 THE WITNESS: The green screen is three inches
5 thick, and it's mounted to the face of the --
6 BY MS. ROSENFELD:
7 Q And if the green screen --
8 MR. GROSSMAN: Finish that sentence, Mr. Willard.
9 That's mounted to the face of the?
10 THE WITNESS: I'm sorry. Yeah, it's mounted to
11 the -- it's mounted to the face of the concrete wall.
12 MR. GROSSMAN: Okay.
13 BY MS. ROSENFELD:
14 Q And it's on both sides of the concrete wall,
15 correct?
16 A That's correct.
17 Q Okay. And then the guardrail, if we could go back
18 to --
19 A 265(d).
20 Q -- 265(d), is the guardrail shown on that plan?
21 A No, it's not shown on this plan. It's not
22 labeled.
23 Q Does it go the full length of the wall?
24 A I believe it does. I'm not 100 percent sure.
25 Q Would that be shown on other plans or on your

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1 plans?
2 A It's probably shown on the engineer's plans.
3 MS. HARRIS: Are you asking me? I can't answer.
4 THE WITNESS: I'm sure it's on the engineer's
5 plans.
6 BY MS. ROSENFELD:
7 Q Can you show me on 265(d) what trees will be
8 removed, if any?
9 A We're not removing any trees.
10 MS. DUCKETT: We can't hear back here.
11 THE WITNESS: We're not removing any trees.
12 MS. ROSENFELD: I was asking if any --
13 THE WITNESS: Thanks, sorry.
14 MS. ROSENFELD: -- if any trees were going to be
15 removed.
16 BY MS. ROSENFELD:
17 Q The plantings in the stormwater management areas,
18 what -- do you know who's responsible for maintaining those
19 plants?
20 A My understanding is Costco will be maintaining
21 those plants.
22 Q And do you have a maintenance regimen in the plans
23 for those plantings?
24 A No.
25 Q What happens if those plants die? Does it affect

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1 the efficacy of the stormwater facility itself?
2 A Sure, yes, it will.
3 Q And what happens if they die?
4 A Well, there's a couple of scenarios that could
5 occur. One is, if they die within the warranty period of
6 the installation, the contractor is required to come back
7 and replace them, but ultimately Costco would -- if they die
8 after the warranty period, then it would be up to the owner
9 of the property to replace them.
10 Q Is the stormwater management facility more
11 efficient or less efficient if they die? Or what happens to
12 the functionality of the stormwater management facility if
13 the plants die?
14 A If the plants die, they wouldn't take up any of
15 the pollutants that come through the rainwater. So, yeah,
16 the efficiency of a bioretention basin wouldn't work if it
17 had dead plants in it, or not as well.
18 MR. GROSSMAN: So are you suggesting,
19 Ms. Rosenfeld, that there should be a proposed condition, if
20 the Board of Appeals grants the special exception, that the
21 plantings and the stormwater management facility be
22 maintained?
23 MS. ROSENFELD: It certainly seems to me that
24 there should be some standard protocol for what --
25 MR. GROSSMAN: Okay.

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1 MS. ROSENFELD: -- maintenance would be required.
2 MR. GROSSMAN: So make sure you include that in
3 your list of proposed conditions that you file at the
4 conclusion of the hearing. I take it there wouldn't be an
5 objection to that, is that correct, Mr. Brann?
6 MR. BRANN: No, we have no objection.
7 MR. GROSSMAN: Okay.
8 BY MS. ROSENFELD:
9 Q The plantings that are shown on your landscape
10 plan, do you know if they conform to any stormwater
11 management concept plan approved by DPS?
12 A My understanding is that the planting plan that is
13 shown on this exhibit, 265(d), reflects the same plants
14 that's shown on a planting plan that we did for stormwater
15 management approval in conjunction with the civil engineer.
16 So we --
17 Q Okay. Based on the modified --
18 A Yes.
19 Q -- layout? On 265(d) there are some areas up more
20 toward the north, the western side of the wall and the path
21 where trees are only, existing trees are only a foot or two
22 off of where the wall and/or the path are going to be
23 constructed. Is it your testimony that none of those trees
24 will be removed as part of the construction?
25 A Yes. I'm not aware of any trees that will require

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1 removal because of the construction of the wall.
2 Q Are you familiar with cypress trees that are
3 located along the perimeter of the mall parcel near, near
4 the wall?
5 A Cypress trees? No, I'm not. I don't recall any
6 cypress trees. There's some in this location way over here.
7 MR. GROSSMAN: When you say this location --
8 THE WITNESS: The south -- yeah.
9 MR. GROSSMAN: -- you're referring to east --
10 THE WITNESS: Yeah.
11 MR. GROSSMAN: -- southeast of the Costco
12 warehouse?
13 THE WITNESS: Yes, south of the Costco warehouse
14 store itself. There's some Leyland cypress trees here. The
15 wall stops before you reach those.
16 MR. GROSSMAN: So they're to the east of the wall
17 location also?
18 THE WITNESS: To my knowledge, yes.
19 MR. GROSSMAN: Okay.
20 BY MS. ROSENFELD:
21 Q Are you familiar with where the existing guardrail
22 is on the property?
23 A No, not --
24 Q In the lower --
25 A -- not exactly. I know roughly where it is, but I

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1 wouldn't want to --

2 Q Right around the curve, there's a couple of large

3 trees that are shown hanging over the ring road.

4 MR. GROSSMAN: What curve, Ms. Rosenfeld?

5 MS. ROSENFELD: The southwestern corner, basically

6 the curve down there.

7 BY MS. ROSENFELD:

8 Q If you look, there's a couple of canopies that

9 overhang the ring road --

10 A Uh-huh.

11 Q -- on the lower corner there. You're not familiar

12 with any cypress trees in that area?

13 A I'm not. I'm not. They may exist. I don't

14 recall them there, but --

15 Q Do you know how much of the root zone of any of

16 these trees will be disturbed in putting in the wall?

17 A They won't be disturbed because the wall is not

18 going to have a linear footing. It's only going to have

19 augered holes drilled for the columns to minimize the

20 disturbance.

21 Q And are there going to be any root zones impacted

22 with construction of the path?

23 A No.

24 Q Do you know who will be responsible for the

25 maintenance of the wall plantings?

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1 A Costco, is my understanding, will be responsible

2 for the maintenance.

3 Q And do you have any protocol for what maintenance

4 regimen would be appropriate for the plantings that you've

5 provided on the plan?

6 A I haven't put any protocol on the drawings, no.

7 Q In your experience, would there be an appropriate

8 protocol for maintenance for these types of plantings in

9 terms of watering, pruning?

10 A Yes, sure. The vine that's proposed to occur on

11 the green screen will require pruning over time.

12 Q Okay. And in terms of watering?

13 A It's a pretty tough vine. Initially, for the

14 first three months, we would recommend watering new plants,

15 depending on the plants, the trees, the size, et cetera, but

16 this -- the plant that we specified for the green screen is

17 pretty resilient to drought and extreme soil conditions.

18 MS. ROSENFELD: Mr. Grossman, I suspect we'll be

19 proffering a condition for maintenance of the wall plantings

20 as well.

21 MR. GROSSMAN: Anything you think will be helpful,

22 Ms. Rosenfeld.

23 BY MS. ROSENFELD:

24 Q You mentioned, when you went to visit the site,

25 you did notice that there were some disturbed areas within

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1 the buffer. Did you recommend any specific types of

2 plantings to stabilize the erosion or mitigate future

3 erosion in those areas?

4 A No.

5 Q So under your current planting plan, that erosion

6 could continue, right?

7 A It wasn't of significant amount that it warranted

8 an immediate address by anyone that I could -- by the mall

9 or by Costco right away. It didn't seem to be that

10 significant, but I think it's, you know, people walk through

11 there and they leave a trail, and as long as people continue

12 to walk through it, there'll be foot traffic through there.

13 Q Did you notice erosion in areas that were not

14 associated with trails, areas where there just was steep

15 slopes and there was erosion and there were exposed gullies?

16 A Yeah. Well, before the outfall to the stream was

17 repaired, I was in there and you could see the erosion from

18 the storm drain outfall that existed at the time.

19 Q And you've been there since it was repaired?

20 A Actually, I have not been there since they've done

21 the work.

22 Q When is the last time you saw the site?

23 A Probably about a year ago. Well, I was -- I've

24 been to the site, but I haven't been down through the woods

25 in that long ago.

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1 Q Do you know who will do the installation of --

2 A No.

3 Q -- any of the plantings? On Plan 265(d) like dog,

4 there's a number of lines that say sight line, and they

5 appear to me to reflect sight lines from adjoining

6 properties. Can you explain to me what that purports to

7 show?

8 A Sure. Are you referring to the blue-shaded areas?

9 Q Yes --

10 A Yes.

11 Q -- and the black lines that say sight line, and

12 they go to different points on the property.

13 A Right. We were basically trying to plot where the

14 canopy structure of the gas station which is proposed within

15 a special exception area, where that would be visible from a

16 building. So, for example, each building has two lines that

17 project from it to the extreme points of the proposed gas

18 station construction.

19 Q So, for example, when I look at 10817 Melvin Grove

20 Court, there's two, I see two parallel -- well, they're not

21 parallel. I see two lines. There's one that goes almost

22 directly north and it goes to the canopy --

23 A That's correct.

24 Q -- is that correct?

25 A That's correct.

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1 Q And then is there another one on the southeast of
2 that?
3 A Yes, that's correct.
4 Q And it goes over to stormwater plant list; it
5 heads in the direction of the stormwater facility on the
6 eastern side of the project, is that correct?
7 A Yes.
8 Q Am I reading --
9 A Yes, that's correct.
10 Q So does this mean that when you are at the
11 second-floor eye-level elevation, you can see the canopy and
12 you can see the stormwater management facility?
13 A All that means is that's the viewshed from the
14 existing house to the proposed construction within the
15 special exception area.
16 Q So you could see those two points above the wall,
17 is that correct?
18 A No, that's not correct. The wall, we determined,
19 blocks the view from those viewsheds.
20 MR. GROSSMAN: So what's the point of the lines?
21 I guess that's the question.
22 THE WITNESS: The point of the line is basically
23 to show -- the blue areas show the viewsheds --
24 MR. GROSSMAN: Yes.
25 THE WITNESS: -- from the existing residential

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1 properties or buildings to the proposed construction. So
2 when we proposed our plantings, we proposed to block those
3 viewshed areas.
4 MR. GROSSMAN: All right.
5 BY MS. ROSENFELD:
6 Q Is it the plantings that block the viewshed, or is
7 it the wall?
8 A It's a combination of the -- well, the wall blocks
9 the view of the construction, and the plantings sort of
10 enhance and soften the view of the wall.
11 Q So if I go over to the structures on Littleford
12 Lane, is it your testimony that you cannot see anything into
13 the mall parcel from these, any of these townhomes?
14 A No. There's -- we were trying to plot these
15 viewsheds in order to determine where to enhance and thicken
16 the plantings. There's an existing cypress, Leyland cypress
17 hedge there that exists to block the view.
18 MR. GROSSMAN: There, being just south of the
19 Costco warehouse?
20 THE WITNESS: Immediately south of the Costco
21 warehouse store.
22 MR. GROSSMAN: Okay.
23 THE WITNESS: And, of course, the plantings were
24 meant to block the view of the special exception area, not
25 the Costco warehouse store. That wasn't --

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1 BY MS. ROSENFELD:
2 Q Oh, I understand that. But, for example, looking
3 at 10841 Littleford Lane, it would appear to me, looking at
4 this exhibit, that they would be able to see through to the
5 stormwater management facility on the left, on the western
6 side of the special exception property.
7 A I don't see, there's a -- the wall south of the,
8 immediately along the curb of the ring road stops
9 approximately right here, immediately south of the loading
10 area of the Costco warehouse store. There is an existing
11 wall as part of the Costco warehouse on the inside of the
12 ring road, immediately adjacent to the building here --
13 Q So --
14 A -- so I'm not sure how they could see the gas
15 station.
16 Q -- let me ask the question a different way.
17 MR. GROSSMAN: Well, before you do, point to the
18 stormwater management facility, if you would.
19 THE WITNESS: Right here.
20 MR. GROSSMAN: All right. So --
21 THE WITNESS: And here.
22 MR. GROSSMAN: Okay. So the stormwater management
23 facility is just to the south of the special exception site?
24 THE WITNESS: Right. The bioretention ponds,
25 which are part of the stormwater management system --

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1 MR. GROSSMAN: Okay. All right.
2 THE WITNESS: -- exist in this location, south --
3 MR. GROSSMAN: So --
4 THE WITNESS: -- at the very southern end of the
5 special exception area.
6 MR. GROSSMAN: -- your question was can they, can
7 the stormwater management facility be seen from --
8 MS. ROSENFELD: Right.
9 MR. GROSSMAN: -- outside of the, of the --
10 MS. ROSENFELD: Maybe it'll be easier if I
11 approach.
12 THE WITNESS: Okay.
13 MR. GROSSMAN: All right.
14 BY MS. ROSENFELD:
15 Q When I read this plan, for example, if you're at
16 10812 Melvin Court and this line carries through to this
17 point and it says sight line, to me --
18 MR. GROSSMAN: To this point, being right at the
19 northern side of the special exception site?
20 MS. ROSENFELD: Correct, just to the kiosk.
21 MR. GROSSMAN: Okay.
22 BY MS. ROSENFELD:
23 Q That to me means that a person standing at
24 second-floor eye-elevation level can see the canopy. Now,
25 is that --

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1 A Without the wall being there.
2 Q Okay. Are you saying then that this blue shaded
3 area is what you can see, and once the wall is up, this is
4 where the viewshed stops?
5 A That's right.
6 Q In every case?
7 A That's right.
8 Q And is there any structure here that can see over
9 the wall?
10 A Yeah, they can see over the wall, but they'll just
11 see the sky in the distance; they won't see any buildings.
12 Q They can't see the special exception --
13 A Right. Right.
14 Q All right.
15 MR. GROSSMAN: Mr. Willard, are you saying that
16 they, being a person at ground level or six feet above
17 ground level, cannot see over? Or are you saying that even
18 if they were on the second floor of their home or a home,
19 they could not see over the wall?
20 THE WITNESS: The latter. I'm saying from the
21 second-floor view, we've drawn a cross section based upon
22 the topography information that we have, this topo survey of
23 the locations of all the houses, and have plotted sight
24 lines from the second-story windows from someone's eye
25 level, and it determined an eight-foot high wall would block

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1 the view of the gas station's structure.
2 MR. GROSSMAN: Okay, thank you.
3 BY MS. ROSENFELD:
4 Q On the Exhibit 265(d), along the western side of
5 the buffer area, there -- I proffer Kensington Heights will
6 provide evidence that there are additional eroded areas
7 independent of paths. Are you familiar with any of those
8 areas?
9 A No.
10 Q Okay. So there's nothing in your plan that
11 would --
12 A No.
13 Q -- serve to mitigate the effect of that?
14 A No.
15 Q Okay. Also, in your plans, I did notice that you
16 had some -- it's Exhibit L1.04, and I'm not sure which
17 exhibit number it is -- it does have some general
18 maintenance notes in here, is that correct?
19 MS. HARRIS: I'm sorry. Can you repeat that? It
20 does have some general what?
21 MS. ROSENFELD: Maintenance notes.
22 THE WITNESS: Actually, the drawing, yeah, had the
23 planting notes, yeah, right on there.
24 BY MS. ROSENFELD:
25 Q Just generic? These are generic notes?

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1 A Yes. Yeah -- well, yeah.
2 Q And I notice No. 1C, Weed Control, says burning by
3 an experienced professional is an alternative to mowing
4 every third year. Is that something that you would
5 recommend in the vicinity of a mega gas station?
6 A Probably not, not a good idea around the --
7 MR. GROSSMAN: Just for clarity of the record,
8 what is the exhibit number of that exhibit?
9 MS. HARRIS: It's 265(b).
10 MR. GROSSMAN: B, as in boy?
11 MS. HARRIS: Yes.
12 MR. GROSSMAN: Okay.
13 THE WITNESS: An experienced professional.
14 BY MS. ROSENFELD:
15 Q Do you have any protocol for how that would be
16 done?
17 A Just it's, all we have -- as noted on the plans,
18 it's by an experienced professional doing that sort of work.
19 You know, this is such a small area. I'm not sure that's
20 really an appropriate method for maintaining the overgrowth
21 of plants in this specific situation.
22 Q Would you recommend removing that note?
23 A If it would be acceptable to Park and Planning,
24 sure.
25 Q That might be something they'd want to follow up

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1 on.
2 MS. ROSENFELD: I have no further questions.
3 MR. GROSSMAN: All right, thanks. Any further
4 cross-examination?
5 (No audible response.)
6 MR. GROSSMAN: Seeing no hands, any redirect?
7 MS. HARRIS: No, thank you.
8 MR. GROSSMAN: All right. Thank you very much,
9 Mr. Willard, appreciate it. All right. I think before our
10 next witness, we could take a break. Before we do, it
11 occurs to me, I wonder whether or not it wouldn't be even
12 preferable to both sides if we did have Dr. Chase testify
13 today but the cross-examination of Dr. Chase was postponed
14 until the subsequent date, and then you would have the
15 benefit of actually hearing his direct testimony.
16 MR. GOECKE: We've already told him that he was
17 not going to be testifying today. So he's --
18 MR. GROSSMAN: Of course.
19 MR. GOECKE: -- he's gone to the office to work on
20 the letter.
21 MS. HARRIS: Yes, we were trying to be efficient.
22 MR. GROSSMAN: I know. You were very efficient.
23 Thank you. I thought it -- it occurred to me in the middle
24 of this that that might even be preferable to the opposition
25 as well as to the applicant, but if that's not the case --

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1 MS. ROSENFELD: I, frankly, would rather see the
2 report.
3 MR. GROSSMAN: Okay. All right. All right. Then
4 let's take a five-minute break, come back at 11:45, and I
5 guess we'll proceed with Mr. Scharman then. Is that --
6 MS. CORDRY: Oh, that's right.
7 MS. HARRIS: And can we confirm, is it only
8 Mr. Scharman that's going to be speaking and then we're
9 going to recess for the rest of the day? Is that correct?
10 MR. GROSSMAN: Is there anybody else that would be
11 sensible to do now given --
12 MS. HARRIS: Who's present? Not to my
13 knowledge --
14 MS. CORDRY: No.
15 MS. HARRIS: -- but I just wanted to confirm given
16 the number of people in the audience.
17 MS. CORDRY: No.
18 MR. GROSSMAN: Well, is there anybody else who
19 wishes to be heard from today?
20 MR. BRANN: No.
21 MR. GROSSMAN: I guess that's the answer.
22 MS. HARRIS: Okay, thank you.
23 MR. GROSSMAN: Okay. So we'll come back at 11:45.
24 (Whereupon, a brief recess was taken.)
25 MR. GROSSMAN: All right. So we're ready to go

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1 back on the record now? All right. Mr. Scharman, did you
2 want to take the stand again?
3 MR. SCHARMAN: Thank you, Your Honor.
4 MR. GROSSMAN: All right. And you are still under
5 oath, having testified before.
6 (Witness previously sworn.)
7 DIRECT EXAMINATION
8 BY MR. GROSSMAN:
9 Q You may proceed.
10 A Thank you. During the break, I passed out
11 exhibits or hard copies of the exhibits that I previously
12 e-mailed --
13 Q All right.
14 A -- or proposed exhibits.
15 Q Yes, and actually, I have them -- I'm not sure
16 whether you had sent us hard copies or we just printed it
17 out from there, but I already have them in the record as
18 Exhibits 261 and then (a) through (g), which includes -- (a)
19 being the Kensington Code Section 5-105, and then the rest
20 of them being the aerial maps that you e-mailed me.
21 A The purpose of these proposed exhibits was --
22 MS. SHEARD: Could you speak into the mike,
23 please, or speak as loud as --
24 MR. GROSSMAN: Yes, but we don't have a mike at --
25 MS. SHEARD: There is no mike; just louder,

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1 please.
2 BY MR. GROSSMAN:
3 Q A little bit louder.
4 A The purpose of these proposed exhibits are in
5 response to Dr. Cronyn's testimony regarding his expert
6 opinions from the last session at which time I was doing
7 some cross-examination and asked for data points. He did
8 not have them at the time. Ms. Harris said that she would
9 check during the break to provide them to us. We did not
10 receive them before this hearing, and so we prepared these
11 as potential to discuss his data points of the Kensington
12 area for which his report is in part based.
13 Q And the these would be the aerial maps in 261(b)
14 through 261(g)?
15 A That's correct.
16 Q Okay.
17 A And first, 261(a) is the Town of Kensington
18 ordinance relating to gasoline stations and that they are
19 prohibited unless they are further than 1,000 feet from a
20 gas station from the point that that statute was enacted,
21 which was 1992.
22 Q Yes, I took a look to reassure myself. I take it
23 that the area of Kensington does not include the special
24 exception area; so the special exception area is not covered
25 by this statutory provision, is that correct?

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1 A That's correct, and the purpose of that exhibit
2 was to demonstrate that, unless there was a special
3 exception, no new homes were built subsequent to 1992 within
4 1,000 square feet of the six gasoline stations that
5 Mr. Cronyn was talking about in the Town of Kensington, so
6 that he was only discussing older housing stock --
7 Q All right.
8 A -- during his comparative analysis of the
9 Kensington homes versus the homes that were adjacent to or
10 within the 400 feet of the special exception zone.
11 Q Right. But you're not suggesting by providing
12 this citation to this Kensington ordinance that somehow this
13 governs the special exception in question?
14 A Absolutely not --
15 Q Okay.
16 A -- other than it may, it may provide background at
17 least as to the neighboring town's opinion as to what they
18 feel would be a safe and appropriate distance from a gas
19 station to a house.
20 Q Okay.
21 A The aerial views are of 400 feet, and those are
22 the -- my wife, Barbara Scharman, may be better qualified to
23 testify about these maps because she created them -- but
24 they are aerial views of the six gas stations in the Town of
25 Kensington that Dr. Cronyn discussed as basing his testimony

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1 on the comparative real estate values between the Town of
2 Kensington housing stock and the housing stock within the
3 400 linear feet of the proposed special exception. This,
4 these aerial views would show that there are approximately
5 10 homes within the 400 -- less than 10 homes within the 400
6 linear feet of the six gas stations that Dr. Cronyn studied
7 in the Town of Kensington.
8 Q Okay.
9 A His data points or his chart, Table 1, and I'm not
10 sure what exhibit his report is --
11 MR. GROSSMAN: Do you remember, Ms. Harris, what
12 exhibit number --
13 MS. HARRIS: What exhibit number?
14 MR. GROSSMAN: -- for Mr. Cronyn's report?
15 MS. HARRIS: Well, we resubmitted; so there was a
16 more recent one that was submitted. Exhibit 16 is the --
17 MR. GROSSMAN: Original.
18 MS. HARRIS: -- original.
19 BY MR. GROSSMAN:
20 Q So is that the one you're referring to, is the
21 original one?
22 A I believe so. It was --
23 Q What's the date?
24 A -- dated September 21, 2012, and it was the one --
25 Q Yes, that would be --

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1 A -- that he was testifying about in our last
2 hearing.
3 Q Yes, that would be the original, Exhibit 16.
4 A And on page 10, I guess, Table 1 --
5 MS. HARRIS: And if I could just note, 243,
6 Exhibit 243 was the revised Exhibit 16, which was
7 hand-delivered here.
8 THE WITNESS: And I don't know which page this
9 refers to, but it is Table 1 to the report --
10 BY MR. GROSSMAN:
11 Q Okay.
12 A -- dated September 21, 2012. And in Table 1,
13 Dr. Cronyn --
14 MS. CORDRY: Mister.
15 THE WITNESS: Mr. Cronyn, I'm sorry --
16 MS. CORDRY: Too many doctors around here.
17 THE WITNESS: -- shows economic values for homes
18 sold along Connecticut Avenue, starting from 1994 going
19 through 2011, and I suggest that they -- that looks like
20 there are more than 10 homes being sold in that 17-year
21 period.
22 BY MR. GROSSMAN:
23 Q So, are you suggesting that some of those homes
24 were outside of the 400-foot area to the closest existing
25 gasoline station? Is that what you're -- is that the import

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1 of what you're saying?
2 A That's, that's certainly one basis for the import.
3 The other one would be that these statistics don't really
4 demonstrate anything; that perhaps the statistical sample
5 was too small, being that it was less than one per year or
6 no more than one per year, or that he was using all of the
7 homes that sold in the Kensington area near the Kensington
8 gas station, and I guess that's all, all it could represent
9 other than we don't know, without data points, what
10 Mr. Cronyn is trying to establish by his economic analysis,
11 comparing homes within the Town of Kensington and homes
12 within the special exception area. And I would also suggest
13 that if we had had those data points, we could have looked
14 to the homes themselves to see if there were any
15 differences. For example, one home might have been 5,000
16 square feet and another home might have been 2,000 square
17 feet and that might have explained the difference in the
18 sales price of those homes.
19 Q Yes. I'm sure it's very difficult to make these
20 statistical analyses with the few data points you have in
21 this kind of thing, for sure.
22 A And that was the only purpose of these exhibits,
23 and I would guess that I'd move that they be admitted, and I
24 have nothing further to talk about.
25 Q Okay. Yes, we'll consider final admission issues

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1 at the end, and anybody can make an objection, if they want
2 to, to various exhibits. I've invited the parties to do
3 that. Generally speaking in these land-use cases, we've
4 pretty freely admitted things and then analyzed them, giving
5 them what weight they should be given in our opinion, based
6 on ability to observe, reliability of the evidence, and so
7 on, as -- in terms of the other evidence that's admitted.
8 MR. GROSSMAN: All right. Cross-examination?
9 MS. HARRIS: Yes.
10 CROSS-EXAMINATION
11 BY MS. HARRIS:
12 Q Mr. Scharman, do you have any evidence that gas
13 stations in fact decrease the property values of a
14 residential home?
15 A No, I do not.
16 Q Okay.
17 MS. HARRIS: That's my only question.
18 MR. GROSSMAN: All right. Other
19 cross-examination?
20 MS. ROSENFELD: No, thank you.
21 MR. GROSSMAN: Are you sure nobody wants to
22 brutalize Mr. Scharman?
23 THE WITNESS: And I would thank you if you don't.
24 MR. GROSSMAN: We can invite your wife to do --
25 THE WITNESS: Well, if you'd like.

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1 MS. ADELMAN: You asked her that last time.
2 MR. GROSSMAN: All right. Thank you very much,
3 Mr. Scharman.
4 THE WITNESS: Thank you, Your Honor.
5 MR. GROSSMAN: And I have your exhibits in the
6 administrative record file here.
7 MS. HARRIS: Mr. Grossman, I'd note we have not
8 yet heard back from David Sullivan. We'll continue to try
9 to get in touch with him, and as soon as we know, we can
10 e-mail you and the parties.
11 MR. GROSSMAN: All right. So I guess where we
12 would leave this then is it's okay, I take it, for Dr. Chase
13 to appear on the 16th?
14 MR. GOECKE: That has not yet been confirmed.
15 MS. HARRIS: But we could do that momentarily, if
16 that would be helpful.
17 MR. GOECKE: I can step out right now and do that.
18 MR. GROSSMAN: Because I thought that was our
19 plan, yes.
20 MS. HARRIS: His assistant thought he would be,
21 but I'd just be, feel more comfortable if we can confirm it.
22 MR. GROSSMAN: All right. Let's see if we can
23 confirm that so we confirm something up here. And in the
24 meantime, can we get, Ms. Harris, can we get a, Dr. Chase's
25 additional report or report based on this by tomorrow?

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1 MS. HARRIS: He was told that he needed to do
2 that, so yes.
3 MR. GROSSMAN: Okay. All right. And you could --
4 MS. HARRIS: It may be close of business tomorrow,
5 but yes.
6 MR. GROSSMAN: Yes, and e-mail it out to --
7 MS. HARRIS: Yes.
8 MR. GROSSMAN: -- to all the other participants.
9 MS. ROSENFELD: And, Mr. Grossman, I'd just like
10 to ask again that when exhibits are being e-mailed out, if
11 you could add Karen Cordry to the e-mail distribution list.
12 MR. GROSSMAN: I think I generally -- I try to
13 include you in there.
14 MS. CORDRY: I think I generally get it from you,
15 but I don't --
16 MR. GROSSMAN: Yes.
17 MS. CORDRY: -- necessarily always get all of
18 them.
19 MR. GROSSMAN: Okay. And I also --
20 MS. CORDRY: Sometimes somebody else doesn't
21 realize that I'm not getting them; so --
22 MR. GROSSMAN: I also include Mr. Silverman in
23 there too.
24 MS. CORDRY: Yes.
25 MR. SILVERMAN: I appreciate that because I don't

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1 get them otherwise.
2 MS. CORDRY: Quasi co-counsel.
3 MR. GROSSMAN: So if this works out, we would have
4 Dr. Chase on September 16, we would have you, Ms. Cordry, on
5 September 16 --
6 MS. CORDRY: On the need issues, yes.
7 MR. GROSSMAN: On the need issue only, and then we
8 would have Mr. Sullivan on September 20. Is that, assuming
9 that we, it all gels --
10 MS. HARRIS: Correct.
11 MS. ROSENFELD: Mr. Grossman --
12 MR. GROSSMAN: Yes, ma'am.
13 MS. ROSENFELD: -- on the motion in limine, the
14 applicant's response is due by the 16th. I don't know if
15 you are interested in any kind of oral argument or
16 discussion on that, and if so, I don't know if it's possible
17 if we could either schedule a very limited time to come in
18 and present to you or if we could do something by conference
19 call if that's something that you think might be helpful to
20 you.
21 MR. GROSSMAN: Well, I haven't seen the
22 applicant's response yet. So I don't, I don't know that I,
23 that I will need that --
24 MS. ROSENFELD: Okay.
25 MR. GROSSMAN: -- but I will schedule it if, if

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1 need be. How's that?
2 MS. ROSENFELD: Okay. All right, thank you.
3 MR. GROSSMAN: I mean, things are in somewhat
4 unusual posture in that the motion for summary disposition,
5 of course, is before the Board of Appeals rather than me and
6 your motion in part relies on the concept of changing facts
7 that are pending before, when a motion is pending, and so it
8 is, it's an unusual situation.
9 MR. SILVERMAN: Is it correct that you're the
10 judge of evidence, the admissibility of evidence?
11 MR. GROSSMAN: As far as the admissibility, yes,
12 and I would make findings, as well, and the recommendation.
13 MR. SILVERMAN: And when the Board has a motion
14 before it, do they ever ask you or do you ever volunteer
15 findings of fact related to that motion?
16 MR. GROSSMAN: We've never had a situation in my
17 recollection in which there was a matter, a hearing pending
18 before me, I mean, in the middle of a hearing, and somebody
19 filed a motion with the Board at that time. I mean, it's
20 conceivable it's happened in front of some other hearing
21 examiner, but I don't recall it ever happening. So I can't
22 really answer your question -- well, it hasn't happened; so
23 the Board hasn't asked.
24 MR. SILVERMAN: I got you.
25 MS. ROSENFELD: It's been complicated because they

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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

	107:15;120:21	33:2,6;35:6;37:11,23; 38:6;56:10,18	Although (3) 23:15;24:10;56:11	application (1) 73:8
§	add (4) 16:5;19:7;23:6; 115:11	advanced (1) 37:7	always (1) 115:17	applied (1) 35:4
\$1 (1) 34:9	additional (10) 12:13;17:12,13; 28:13;36:8;39:7;59:22; 70:1;103:6;114:25	adversarial (1) 57:5	amended (3) 19:25;118:6;119:17	applies (1) 30:25
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