



**Zoning Text Amendment (ZTA) No. 15-07, Filling Station – Special Exception Use Standards**

---



Gregory Russ, Planner Coordinator, FP&P, [gregory.russ@montgomeryplanning.org](mailto:gregory.russ@montgomeryplanning.org), 301-495-2174  
Pamela Dunn, Acting Chief, FP&P, [pamela.dunn@montgomeryplanning.org](mailto:pamela.dunn@montgomeryplanning.org), 301-650-5649

**Completed: 04/30/15**

---

**Description**

ZTA 15-07 revises the use standards for the conditional use approval of a large filling station by requiring that any new filling station designed to dispense a minimum of 3.6 million gallons per year to be located at least 500 feet from any public or private school, any park or playground, a day care center, any outdoor use categorized as a civic and institutional use or recreational and entertainment use, any dwelling unit or any wetland, stream, river, flood plain, or environmentally sensitive area. Currently, a 300-foot distance is required from most uses listed above. The new uses from which a minimum distance would be required include land with a dwelling unit on it and any wetland, stream, river, flood plain, or environmentally sensitive area.

**Summary**

**Staff does not recommend approval of the increase in distance between large filling stations and certain sensitive land uses as proposed under ZTA No. 15-07. The public input requirement of the conditional use approval process provides an opportunity to address concerns unique to a particular site that could warrant increasing the setback beyond 300 feet. Staff however, recognizes that there is a rational basis for establishing a setback of large gas stations from residential properties but recommends limiting the use based on the abutting zone and use – i.e. not allowing the use within 300 feet of an Agricultural, Rural Residential, or Residential zone improved with a residential use.**

**Staff further recommends against requiring a large filling station to locate at least 500 feet from any wetland, stream, river, flood plain, or environmentally sensitive area. All filling stations must adhere to State standards to prevent leakage and spills, as well as meet stormwater management requirements.**

Currently, a filling station is allowed in the CRT, CR, IL, IM, and Employment zones only through approval of a conditional use application by the Hearing Examiner. Furthermore, for any underlying CRT or NR zones in the Takoma Park/East Silver Spring Commercial Revitalization (TPESS) Overlay Zone, the use is allowed by conditional use **only** if it does not abut or confront land in a Residential Detached zone. Approval of ZTA 15-07 would impact the application of any proposed new filling station in any of these zones.

## Background/Analysis

- On July 24, 2012, the District Council adopted ZTA No. 12-07 adding standards for special exception (renamed conditional use as of October 30, 2014 -new Zoning Ordinance) approval for large gas stations (designed to dispense at least 3.6 million gallons of fuel per year). These facilities are to be located at least 300 feet from any public or private school, any park or playground, a day care center, or any outdoor use categorized as a civic and institutional use or recreational and entertainment use.
- The Planning Board, in its report to the Council, could not come to a consensus (a vote of 2:2). Two members recommended that ZTA No. 12-07 be denied on the basis of the recommendation by technical staff that the existing special exception process provided adequate standards and requirements to address issues that potentially could impact properties near a proposed gas station and that the public input requirement of the special exception process provides opportunity to address concerns unique to a particular site. They further opined that any necessary changes to the current structure for reviewing and approving gas station requests should be made in the land use tables, not as part of the special exception standards. They were not convinced that a ZTA was needed at this time mainly based on the concern that they did not yet have enough evidence about the health effects of gas stations or how those effects might vary based on the size of the station. The two other Board members believed that it was appropriate to recommend changes that would establish a buffer zone from certain outdoor oriented uses for all gas stations, with the Chair suggesting that 300 feet might be appropriate (the ZTA as introduced included a 1,000-foot separation but was reduced to 300 feet by the County Council during their deliberations). The rationale was based on potential health effects and, more generally, the overall inherent adverse effects of gas stations, particularly if the industry begins to move away from the traditional, small neighborhood gas station model. In their view, the special exception process did not effectively regulate gas stations near sensitive uses because a denial cannot be based solely on inherent adverse effects. (see Attachment 2, Planning Board transmittal to County Council, including the technical staff report).
- The District Council in approving ZTA No. 12-07 sited that the purpose of the amendment was to reduce the health risks and the traffic and truck nuisance caused by large gas stations to nearby property where people, particularly children, have the opportunity for active outdoor recreation. The Council also found that a minimum buffer area is required, in addition to the other standards for a special exception. The Council had made similar determinations for other land uses that require special exception approval.
- The Council found a number of reasons to distinguish large gas stations (designed for 3.6 million or more gallons sold per year) from smaller gas stations:
  - 1) *Some 96 percent of gasoline stations pump 2.4 million gallons of fuel per year or less. Of the 4 percent of stations that pump more than 2.4 million gallons, the average gallons pumped is 3.6 million.*

- 2) *The EPA, in its 2011 School Siting Guidelines, recommended using 3.6 million gallons as the size at which gasoline stations should be treated differently.*
  - 3) *The California Air Resources Board recommended using 3.6 million gallons as the size at which gasoline stations should be treated differently.*
  - 4) *The number of refueling vehicles and tanker trucks coming to a station increases directly with the volume of fuel sold. A gasoline station pumping 3.6 million gallons attracts more than twice the vehicle and tanker truck traffic than the average gasoline station currently operating in the County.*
  - 5) *As indicated by the comments of the Maryland Air and Radiation Management Administration and in academic literature, the gasoline station business changed in the early 1990's, when the super station or hypermarket first appeared on the scene. These stations are vastly different from the small town, low volume local gasoline station. These "super stations" have gone from zero percent of gasoline distribution in the country to 16 percent in the past 2 decades.*
  - 6) *The amount of toxins produced by refueling increases with the amount of gasoline sold at a single station and, therefore, the amount of health risks increases with the volume of fuel delivered and sold.*
  - 7) *The traffic and queues associated with large gas stations impede the use and enjoyment of nearby properties used for outdoor recreation.*
  - 8) *The Zoning Ordinance treats other land uses differently, based on their size. Regional shopping centers are treated differently from smaller shopping centers. Subdivisions are treated differently based on the number of proposed units. Large daycare centers are treated differently from small daycare centers. The different treatments are due to the different characteristics of larger uses.*
- The Council found a number of reasons for acting: 1) The EPA School Siting Guidelines, which highlight the possible dangers of child-centered activity near large gasoline stations, were published in October 2011; 2) The Council learned in a July 10, 2012 letter from the Maryland Air and Radiation Management Administration that the issuance of a permit by the Maryland Air and Radiation Management Administration does not mean that there are no health risks from gasoline vapors or idling cars. (*The Deputy Director of the Air and Radiation Management Administration said, "The more distance that can be placed between a source and residences and community gathering places is certainly beneficial to minimizing risk."*); and 3) Large gasoline stations are a growing trend in the gasoline distribution system.

- The Council found that the minimum buffer necessary to protect public health and welfare is 300 feet from the edge of the special exception area of a large gasoline station to the lot line of any public or private school or any park, playground, day care center, or any outdoor use categorized as a cultural, entertainment and recreation use. This distance conforms to the recommendations of the California Air Resources Board to avoid sensitive land uses within 300 feet of a large gasoline station. The identified sensitive land uses are aligned with the EPA School siting Guidelines. The buffer distance parallels the buffer requirements for all gasoline stations in other jurisdictions. In Prince George's County, a gasoline station must be located at least 300 feet from any lot on which a school, outdoor playground, library, or hospital is located, in addition to its review as a special exception. In the City of Gaithersburg, a gasoline station pump must be located at least 300 from the entrance to a public or parochial school, playground, library, or hospital in the C-3 zone. Just like those other jurisdictions, ZTA 12-07 requires a minimum buffer for large gasoline stations without regard to whether the effects of a gasoline station are inherent or non-inherent.

Specific ZTA Language as Proposed

Under Section 3.5.13.C.2.c. the following language is proposed:

**C. Filling Station**

\* \* \*

**2. Use Standards**

*Where Filling Station is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:*

\* \* \*

*c. Any Filling Station facility designed to dispense a minimum of 3.6 million gallons per year must be located at least [300] 500 feet from the lot line of any land with a dwelling unit; public or private school[, or any]; park[,]; playground[,]; day care center[,]; [or] any outdoor use categorized as a [civic and institutional] Civic and Institutional use or a Recreation and Entertainment use; or any wetland, stream, river, flood plain, or environmentally sensitive area.*

The existing 3.6 million gallons per year figure stems from the Environmental Protection Agency's (EPA) School Siting Guidelines (Guidelines) and the 2005 California Air Resources Board's (CARB) report "Air Quality and Land Use Handbook: A Community Health Prospective." Both the Guidelines and CARB report define a "large gasoline dispensing facility" as a facility with a throughput of 3.6 million gallons per year or greater. The CARB report also recommends avoiding the siting of new sensitive land uses within 300-feet of a large gasoline dispensing facility. Sensitive land uses include: *residences* (e.g., houses, apartments, and senior living), schools, day care centers, playgrounds and medical facilities (e.g., hospitals, convalescent homes, and health clinics). **Staff does not believe that it is necessary to increase the minimum setback from sensitive land uses from 300 feet to 500 feet. The public input requirement of the conditional use approval process provides an opportunity to address concerns unique to a particular site that could warrant increasing the buffer area.**

**Staff however, recognizes that there is a rational basis for establishing a setback of large gas stations from residential properties but believes that, as proposed, the ZTA could be too restrictive. Since the**

Employment, CRT, and CR zones, all allow dwelling units by-right, this could effectively limit new large gas stations to only IL and IM land that is not within 500 feet of a dwelling unit. Instead of the dwelling unit restriction, **staff recommends limiting the use based on the abutting zone and use – i.e. within 300 feet of an Agricultural, Rural Residential, or Residential zone improved with a residential use.** – Otherwise, if a mixed-use project wants to locate near a gas station in a C/R zone (especially in an urban area) it could be argued that the mixed-use shouldn't be approved because of the distance from a gas station- even though that's not what the regulation states.

Staff also has concerns with requiring a large filling station to locate at least 500 feet from any wetland, stream, river, flood plain, or environmentally sensitive area. According to our Environmental staff, the non-inherent aspect of a large gas station is its impact on public health due to a reduction in air quality. There does not appear to be similar justification for environmental features. All filling stations must adhere to State standards to prevent leakage and spills, as well as meet stormwater management requirements.

### Community Comments (Attachment 3)

Staff summarizes the comments from community organizations and/or individuals as follows:

- The inclusion of residences in the ZTA as a factor that triggers the buffer zone is absolutely critical.
- The 500-foot limit appears to be a reasonable compromise between the 1,000 feet originally proposed and the 300 feet currently in effect for a limited number of uses. It is clear that a larger buffer will provide a larger measure of assurance against harm. With the strong possibility that many proposed stations may be far larger than the 3.6 million gallons, the limit should not be set at the lowest level that might be appropriate for the smallest station, since this would leave communities significantly underprotected from the larger stations.
- The Council reasonably recognized that “inherent adverse effects” can interact and exacerbate each other as station sizes increase and that there is a point at which it can be ruled that certain uses are categorically inappropriate in particular locations. The Council also properly decided that each targeted community should not be burdened with proving that categorical decision over and over again at their own expense.
- The additional environmental attributes proposed to be added by this ZTA would assure protection of the sensitive environmental areas that are cherished and increasingly at risk, especially in the Down County. These areas are critical to safeguarding our quality of life

### Memorandum from Pat Harris/Mike Goecke in opposition to ZTA 15-07

The memorandum explains why the senders believe that ZTA No. 15-07 is inappropriate and should not be adopted. Staff summarizes the memorandum as follows:

- ZTA 15-07 constitutes unlawful special legislation. The County Attorney issued a memorandum on ZTA 12-07 concluding that it was not a proper exercise of the District Council's authority for

several reasons, including the statement that the ZTA was designed to specifically eliminate the proposed Costco station. ZTA 15-07 is equally flawed.

- Curtailing the expenses of groups opposing conditional use petitions is an invalid basis for the ZTA.
- There is no rational basis for the proposed 500 foot setback (or even the existing 300 foot setback which serves little value and is inconsistent with other portions of the Zoning Ordinance).
- The existing conditional use provisions provide adequate safeguards.
- Suggested ways to provide real benefits through ZTA 15-07: Adopt legislation that applies measures to all stations and provides real public health benefits.
- ZTA 15-07 is ambiguous and may have unintended consequences –Gas stations are not “designed” to sell any specific number of gallons, and virtually any station can sell 3.6 million gallons of gas.

#### ATTACHMENTS

1. ZTA 15-07 as modified by staff
2. Transmittal letter and Technical Staff Report for ZTA 12-07
3. Citizen Comments on ZTA 15-07
4. Memorandum to Greg Russ from Pat Harris & Mike Goecke dated April 23, 2015

# ATTACHMENT 1

Zoning Text Amendment No.: 15-07  
Concerning: Filling Station – Use  
Standards  
Draft No. & Date: 1 – 3/18/15  
Introduced:  
Public Hearing:  
Adopted:  
Effective:  
Ordinance No.:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

---

By: Councilmembers Elrich, Riemer, Navarro, Katz, Rice, and Hucker

---

**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- Revise the use standards for large filling stations

By amending the following sections of the Montgomery County Zoning Ordinance,  
Chapter 59 of the Montgomery County Code:

DIVISION 59.3.5. “Commercial Uses”  
Section 59.3.5.13. “Vehicle Service”

**EXPLANATION:** ***Boldface** indicates a Heading or a defined term.*  
*Underlining indicates text that is added to existing law by the original text amendment.*  
*[Single boldface brackets] indicate text that is deleted from existing law by original text amendment.*  
*Double underlining indicates text that is added to the text amendment by amendment.*  
*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*  
*\* \* \* indicates existing law unaffected by the text amendment.*

## ORDINANCE

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

**Sec. 1. DIVISION 59.3 is amended as follows:**

**DIVISION 59.3.5. Commercial Uses**

\* \* \*

**Section 3.5.13. Vehicle Service**

\* \* \*

**C. Filling Station**

\* \* \*

**2. Use Standards**

Where Filling Station is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

\* \* \*

- c. Any Filling Station facility designed to dispense a minimum of 3.6 million gallons per year must be located at least [300] ~~[[500]]~~ 300 feet from the lot line of any ~~[[land with a dwelling unit;]]~~ Agricultural, Rural Residential, or Residential zone improved with a residential use; public or private school[, or any]; park[,]; playground[,]; day care center[,]; [or] or any outdoor use categorized as a [civic and institutional] Civic and Institutional use or a Recreation and Entertainment use[[; or any wetland, stream, river, flood plain, or environmentally sensitive area]].

**Sec. 2. Effective date.** This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

29 \_\_\_\_\_

30 Linda M. Lauer, Clerk of the Council



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIR

**MONTGOMERY COUNTY PLANNING BOARD**

The Maryland-National Capital Park and Planning Commission

June 15, 2012

**TO:** The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

**FROM:** Montgomery County Planning Board

**SUBJECT:** Zoning Text Amendment No. 12-07

**BOARD RECOMMENDATION**

The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 12-07 at our regular meeting on June 7, 2012. After an extensive discussion and public hearing, a majority of the Planning Board could not come to a consensus recommendation on the text amendment. Commissioners Dreyfuss and Presley supported staff's position and recommended that the ZTA be denied for two reasons: that the existing special exception process provides adequate standards and requirements to address issues that potentially could impact properties near a proposed gas station and that the public input requirement of the special exception process provides opportunity to address concerns unique to a particular site. They further opined that any necessary changes to the current structure for reviewing and approving gas station requests should be made in the land use tables, not as part of the Special Exception standards. They were not convinced that a ZTA was needed at this time, mainly based on the concern that they did not yet have enough evidence about the health effects of gas stations or how those effects might vary based on the size of the station.

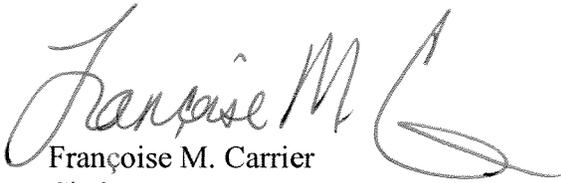
Chair Carrier and Commissioner Anderson believe that it is appropriate to recommend changes that would establish a buffer zone from certain outdoor uses for all gas stations, with Chair Carrier suggesting that 300 feet might be appropriate. The rationale was based on potential health effects and, more generally, the overall inherent adverse effects of gas stations, particularly if the industry moves further away from the traditional, small neighborhood gas station model towards larger stations. In their view, the special exception process does not

effectively regulate gas stations near sensitive uses because a denial cannot be based solely on inherent adverse effects. Commissioner Anderson also suggested a provision barring some or all new gas stations within the "walkshed" of a Metro station on the basis that smart growth, transit-oriented development would make better use of this land.

ZTA 12-07 was introduced to revise the special exception standards for the approval of an automobile filling station by requiring any new automobile filling station designed to dispense more than 3.6 million gallons per year to be located at least 1,000 feet from any public or private school or any park, playground, or hospital, or other public use, or any use categorized as a cultural, entertainment and recreation use. The ZTA also recommends a specific lighting requirement that mirrors that of special exception proposals located in residential zones.

### CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing are the recommendations provided by the members of the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, June 7, 2012.

  
Françoise M. Carrier  
Chair

FC/GR/kr



**Zoning Text Amendment (ZTA) No. 12-07, Special Exceptions – Automobile Filling Station**

---

*GR* Gregory Russ, Planner Coordinator, Functional Planning & Policy Division, [gregory.russ@montgomeryplanning.org](mailto:gregory.russ@montgomeryplanning.org),  
301-495-2174  
[MD] Mary Dolan, Chief, Functional Planning & Policy Division, [mary.dolan@montgomeryplanning.org](mailto:mary.dolan@montgomeryplanning.org) 301-495-4552

**Completed: 05/31/12**

---

**Description**

ZTA 12-07 revises the special exception standards for the approval of an automobile filling station by requiring that any new automobile filling station designed to dispense more than 3.6 million gallons per year to be located at least 1,000 feet from any public or private school or any park, playground, or hospital, or other public use, or any use categorized as a cultural, entertainment and recreation use. The ZTA also recommends a specific lighting requirement that mirrors that of special exception proposals located in residential zones.

**Summary**

**Staff does not recommend approval of ZTA 12-07.** The existing special exception process provides adequate standards and requirements to address issues that potentially could impact properties near a proposed gas station. The public input requirement of the special exception process further provides opportunity to address concerns unique to a particular site.

If the County Council decides to approve ZTA 12-07, staff recommends that the Council:

- Define large gas stations by establishing a maximum number of pumps versus the “gallons per year” gauge as depicted in the ZTA
- Establish a distance separation of 300 feet from the impacted uses versus the 1,000 feet requirement as proposed.
- Decide from where the distance is measured--from the fence line, special exception area, pump islands, or canopy. Staff recommends that the measurement be taken from the canopy.
- Delete the phrase “or any use categorized as a cultural, entertainment and recreation use” (as it pertains to requiring a 1,000 foot distance from a gas station) under Section 59-G-2.06(b). The inclusion of this phrase unnecessarily broadens the scope of the distance separation from certain uses in the land use table such as indoor theatres, indoor rifle or pistol ranges and private clubs and service organizations-some of which also require special exception approval.

Currently, an automobile filling station is allowed in the C-1, C-2, C-3, C-4 and C-6 Commercial zones, a number of industrial zones (I-1, I-2, I-4 and LSC zones), most CBD zones, the TS-M, MXTC, TOMX 2 and CR zones only through approval of a special exception application by the Board of Appeals. For the underlying C-1 and C-2 zones in the Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone, the use is allowed by special exception only if it does not adjoin or confront land in a residential zone. Approval of ZTA 12-07 would impact the application of any proposed new automobile filling station in any of these zones.

## **Analysis**

### **Special Exception Provisions**

#### *Inherent/Non-inherent Effects*

The standard of evaluation for a special exception requires consideration of the inherent and non-inherent adverse effects on the nearby properties and general neighborhood where the use is proposed. Inherent adverse effects are the harmful effects caused by the physical and operational characteristics necessarily associated with the particular use irrespective of the size or scale of operations. Non-inherent adverse effects are any harmful effects caused by physical and operational characteristics not necessarily inherently associated with the particular special exception use, or adverse effects created by unusual characteristics of the site.

Any analysis of inherent and non-inherent adverse effects must first establish what physical and operational characteristics are necessarily associated with a particular special exception use. As established by previous automobile filling station cases, the inherent physical and operational characteristics necessarily associated with an automobile filling station include: (1) fuel pumps; (2) a structure providing storage space and shelter for employees; (3) traffic generated by customers, employees, and fuel delivery trucks; (4) potential for queuing vehicles on site; (5) noise associated with the use; (6) signage advertising gas products and prices; (7) outdoor lighting; (8) longer hours of operation than the average business establishment; (9) environmental impacts that may include fumes from idling vehicles and potential spillage of automobile fluids; and (10) underground fuel storage tanks.

Any adverse effects of a proposed automobile filling station that result from the above ten characteristics are considered inherent adverse effects. Alone, inherent adverse effects are not sufficient to constitute a denial. On the other hand, adverse effects that are not characteristic of an automobile filling station use, or inherent effects that are exacerbated due to distinctive site characteristics, are considered non-inherent adverse effects, which may be sufficient to result in the denial of the special exception application.

#### *General Conditions of Approval for Special Exceptions/Specific SE Standards and Requirements*

An applicant for a special exception must demonstrate that the general and specific standards and requirements are satisfied. These standards include: minimum setback requirements for gas pumps and queuing of vehicles; maintaining harmony with the general character of the adjacent neighborhoods through consideration of design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions; and establishing abatement measures to minimize or eliminate

objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site. When an automobile filling station abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone in an adopted master plan and is not effectively screened by a natural terrain feature, additional screening measures are required.

The special exception process also helps mitigate impacts concerning building/gas pump location and overall site design *on a case by case basis*; a process particularly paramount when an automobile filling station is proposed in the vicinity of residential property.

#### Neighborhood Need

Under § 59-G-1.24, in addition to the findings and requirements of Article 59-G, an automobile filling station may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.

Overall, staff believes that the existing special exception review process provides the site by site analysis provisions and public review opportunities necessary to address the appropriateness of permitting an automobile filling station at a proposed location.

#### Specific ZTA Language as Proposed

Under Section 59-G-2.06(b) the following language is proposed:

(b) *In addition, the following requirements must be [complied with] satisfied:*

(1) *After {effective date}, a new automobile filling station designed to dispense more than 3.6 million gallons per year must be located at least 1,000 feet from any public or private school or any park, playground, or hospital, or other public use, or any use categorized as a cultural, entertainment and recreation use.*

The 3.6 million gallons per year figure stems from the Environmental Protection Agency's (EPA) School Siting Guidelines (Guidelines) and the 2005 California Air Resources Board's (CARB) report "Air Quality and Land Use Handbook: A Community Health Prospective." Both the Guidelines and CARB report define a "large gasoline dispensing facility" as a facility with a throughput of 3.6 million gallons per year or greater. The CARB report also recommends avoiding the siting of new sensitive land uses within 300-feet of a large gasoline dispensing facility. Sensitive land uses include: residences (e.g., houses, apartments, and senior living), schools, day care centers, playgrounds and medical facilities (e.g., hospitals, convalescent homes, and health clinics).

The 1,000 feet distance proposed in the ZTA is premised on the Environmental Protection Agency's (EPA) School Siting Guidelines. The purpose of the guidelines is to recommend that if a school is considering locating within 1,000 feet of certain uses, environmental screening should be done to assess the risks associated with the location. The Guidelines state repeatedly that they are not intended as a

ban on certain uses within a specified distance of a school but rather as a screening tool. Once an environmental assessment has been conducted, if no environmental concern exists, the school may proceed at the given location.

## Conclusion

***Staff does not recommend approval of the approach of this ZTA and therefore recommends denial of ZTA 12-07.*** The existing special exception process provides adequate standards and requirements to address issues that potentially could impact properties near a proposed gas station. The public input requirement of the special exception process further provides opportunity to address concerns unique to a particular site.

Staff does not believe that use of a blanket dispensing measure of “gallons per year” is the right approach when analyzing a special exception for an automobile filling station. If the County Council decides to approve ZTA 12-07, staff recommends that “large gasoline dispensing facilities” be captured by defining a maximum number of pumps associated with the facility. This standard would be simpler to enforce and would not necessitate negotiation about what a station is designed to dispense.

Staff further believes that a distance separation of 1,000 feet from the impacted uses proposed in the ZTA is too large. If the County Council decides to approve ZTA 12-07, staff recommends that the minimum distance be reduced to 300 feet based on the recommendation of the CARB report. The County Council should also decide from where the distance is measured--from the fence line, special exception area, pump islands, or canopy. Staff recommends that the measurement be taken from the canopy. Under Section 59-G-2.06(b), staff also recommends deletion of the phrase “or any use categorized as a cultural, entertainment and recreation use” (as it pertains to requiring a 1000 foot distance from a gas station). The inclusion of this phrase unnecessarily broadens the scope of the distance separation from uses in the land use table such as indoor theatres, indoor rifle or pistol ranges and private clubs and service organizations-some of which also require special exception approval. Attachment 3 depicts land use parcel designations and places of interest that typically fit the categories as stated in the ZTA that are located within 300 feet and 1,000 feet of existing gas stations in the County.

GR/MD/kr

## ATTACHMENTS

1. ZTA 12-07 as introduced
2. Tables and Excerpts from the EPA School Siting Guidelines & the 2005 California Air Resources Board’s (CARB) report “Air Quality and Land Use Handbook: A Community Health Prospective”
3. GIS Info on Parcels and land uses located within 300 feet & 1000 feet of a gas station in Montgomery County

# ATTACHMENT 1

Zoning Text Amendment No.: 12-07  
Concerning: Special Exceptions –  
Automobile Filling Station  
Draft No. & Date: 1 – 4/10/12  
Introduced: April 17, 2012  
Public Hearing:  
Adopted:  
Effective:  
Ordinance No.:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

---

By: Councilmembers Elrich, Ervin, Navarro, and Rice

---

**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- revise the special exception standards for the approval of an automobile filling station.

By adding the following sections of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-G-2. SPECIAL EXCEPTIONS—STANDARDS AND REQUIREMENTS.  
Section 59-G-2.06. Automobile filling station.

**EXPLANATION:** ***Boldface** indicates a Heading or a defined term.*  
*Underlining indicates text that is added to existing law by the original text amendment.*  
*[Single boldface brackets] indicate text that is deleted from existing law by original text amendment.*  
*Double underlining indicates text that is added to the text amendment by amendment.*  
*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*  
*\* \* \* indicates existing law unaffected by the text amendment.*

## ORDINANCE

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

1           **Sec. 1. DIVISION 59-G- 2 is amended as follows:**

2   **DIVISION 59-G-2. SPECIAL EXCEPTIONS—STANDARDS AND**  
3   **REQUIREMENTS**

4   \*   \*   \*

5   **Sec. 59-G-2.06. Automobile filling stations.**

6   (a)   In addition to findings required in division 59-G-1, [An] an automobile  
7       filling station may be permitted[, upon a finding , in addition to findings  
8       required in division 59-G-1,] if the Board of Appeals finds that:

9       (1)   [The] the use will not constitute a nuisance because of noise, fumes,  
10       odors, or physical activity in the location proposed[.];

11       (2)   [The] the use at the proposed location will not create a traffic hazard  
12       or traffic nuisance because of its location in relation to similar uses,  
13       necessity of turning movements in relation to its access to public  
14       roads or intersections, or its location in relation to other buildings or  
15       proposed buildings on or near the site and the traffic pattern from such  
16       buildings, or by reason of its location near a vehicular or pedestrian  
17       entrance or crossing to a public or private school, park, playground, or  
18       hospital, or other public use or place of public assembly[.]; and

19       (3)   [The] the use at the proposed location will not adversely affect nor  
20       retard the logical development of the general neighborhood or of the  
21       industrial or commercial zone in which the station is proposed,  
22       considering service required, population, character, density, and  
23       number of similar uses.

24   (b)   In addition, the following requirements must be [complied with] satisfied:

25       (1)   After {effective date}, a new automobile filling station designed to  
26       dispense more than 3.6 million gallons per year must be located at  
27       least 1,000 feet from any public or private school or any park,

28 playground, or hospital, or other public use, or any use categorized as  
29 a cultural, entertainment and recreation use.

30 [(1)](2) When such use abuts a residential zone or institutional premises  
31 not recommended for reclassification to commercial or industrial zone  
32 on an adopted master plan and is not effectively screened by a natural  
33 terrain feature, the use [shall] must be screened by a solid wall or a  
34 substantial, [sightly,] solid fence, not less than 5 feet in height,  
35 together with a 3-foot planting strip on the outside of such wall or  
36 fence, planted in shrubs and evergreens. Location, maintenance,  
37 vehicle sight distance provisions, and advertising pertaining to  
38 screening [shall be as provided for in article] must satisfy Article 59-  
39 E. Screening [shall] must not be required on street frontage.

40 [(2)](3) Product displays, parked vehicles, and other obstructions  
41 [which] that adversely affect visibility at intersections or to station  
42 driveways are prohibited.

43 [(3)](4) Lighting [is] must not [to] reflect or cause glare into any  
44 residential zone. Lighting levels along the side and rear lot lines  
45 adjacent to a residential zone must not exceed 0.1 footcandles.

46 [(4)](5) When such use occupies a corner lot, the ingress or egress  
47 driveways [shall] must be located at least 20 feet from the intersection  
48 of the front and side street lines of the lot as defined in [section]  
49 Section 59-A-2.1, and such driveways [shall] must not exceed 30 feet  
50 in width[; provided, that in areas where no master plan of highways  
51 has been adopted, the street line shall be considered to be at least 40  
52 feet from the center line of any abutting street or highway].

53 [(5)](6) Each gasoline pump or other service appliance must be located  
54 on the lot at least 10 feet behind the building line; and all service,

55 storage, or similar activities in connection with the use must be  
56 conducted entirely within the building. There must be at least 20 feet  
57 between driveways on each street, and each driveway must be  
58 perpendicular to the curb or street line.

59 [(6)](7) Light automobile repair work may be done at an automobile  
60 filling station[; provided, that no] but major repairs, spray paint  
61 operation or body [or] and fender repair [is permitted] are prohibited  
62 uses.

63 [(7)](8) Vehicles [shall not] must be parked [so as to overhang]  
64 completely off of the public right-of-way.

65 [(8)](9) In a C-1 zone, an automobile, light truck<sub>2</sub>, and light trailer rental,  
66 as defined in [section] Section 59-G-2.07, and in a C-2 zone, an  
67 automobile, truck<sub>2</sub>, and trailer rental lot, as defined in [section] Section  
68 59-G-2.09, may be permitted as a part of the special exception[,  
69 subject to the provisions set forth for such uses in] if the requirements  
70 of this section are satisfied. In addition, a car wash with up to 2 bays  
71 may be allowed as an accessory use as part of the special exception.

72 [(9)](10) In a Rural Village Overlay Zone<sub>2</sub>, the following additional  
73 standards apply for new development:

- 74 (A) Car wash is prohibited.
- 75 (B) Pump canopies must not exceed 35 feet in height.
- 76 (C) Any structure approved for the use must not exceed the scale  
77 and bulk of existing commercial structures in the village.

78  
79 **Sec. 2. Effective date.** This ordinance becomes effective 20 days after the  
80 date of Council adoption.

81

82 This is a correct copy of Council action.

83

84 \_\_\_\_\_

85 Linda M. Lauer, Clerk of the Council

**Exhibit 6: Screening Potential Environmental, Public Health and Safety Hazards**

**IMPORTANT:** This table is intended to assist with the initial screening of candidate locations but is NOT a substitute for case- and site-specific evaluation of potential risks and hazards. It is intended to be used in conjunction with the example Environmental Review Process (see Section 5) and Evaluating Impacts of Nearby Sources of Air Pollution (see Section 6). For more information on typical environmental hazards that may be encountered during the school siting process, see the Quick Guide to Environmental Issues in Section 8). Existing applicable federal, state, tribal or local statutes, ordinances, codes or regulations take precedence over the recommendations contained in this table. Users should check with state, tribal and local authorities for applicable requirements or other recommendations.

Feature/Land Use	Description	Potential Hazard(s)	Recommendations		Additional Information <sup>51</sup>
			Screening Perimeter	Evaluation	
Onsite buildings or structures (including all leased space)	<ul style="list-style-type: none"> <li>All onsite or adjacent buildings/structures slated for reuse, renovation or demolition.</li> </ul>	<ul style="list-style-type: none"> <li>Legacy contaminants in existing structures including lead and other heavy metals, asbestos, PCBs, vapor intrusion/(VOCs), mold, radon, pesticides, pests</li> <li>For existing school buildings, chemicals from laboratory, art, shop, drama, maintenance, cleaning, grounds</li> <li>Structure may not meet current building codes (e.g., for seismic activity)</li> </ul>	<ul style="list-style-type: none"> <li>All onsite structures slated for demolition, reuse or renovation</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate for the presence of hazardous materials or conditions. Age, location, condition and type of structure, and the history of use are critical factors to consider in assessing potential risks. Identify all potential hazards and remediate as appropriate.</li> </ul>	<ul style="list-style-type: none"> <li>Lead</li> <li>Heavy Metals</li> <li>Asbestos</li> <li>PCBs</li> <li>Vapor Intrusion/(VOCs)</li> <li>Mold</li> <li>Radon</li> <li>Mercury</li> <li>Pesticides</li> <li>Air Pollution</li> <li>Risk Assessment</li> </ul>

<sup>51</sup> See the Resources page of the guidelines website for links related to the topics listed under the 'Additional Information.' ([www.epa.gov/schools/siting/resources](http://www.epa.gov/schools/siting/resources))

# School Siting Guidelines

Feature/Land Use	Description	Potential Hazard(s)	Recommendations		Additional Information <sup>51</sup>
			Screening Perimeter	Evaluation	
<ul style="list-style-type: none"> <li>High-traffic roads and highways</li> </ul>	<ul style="list-style-type: none"> <li>High-traffic roads or truck traffic.</li> </ul>	<ul style="list-style-type: none"> <li>Air pollution</li> <li>Noise</li> <li>Accidental releases/spills of hazardous chemicals</li> <li>Pedestrian and bike safety</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate all high-traffic roads and highways within ~½ mile</li> <li>Roads farther away with a high likelihood of accidental releases should also be considered</li> </ul>	<ul style="list-style-type: none"> <li>In general, air pollutant concentrations will be highest closer to the source, decreasing with distance from the road. Many factors affect the magnitude and extent of impacts, so the potential variables and mitigation options described in Exhibit 5 should be evaluated. Consider additional mitigation strategies for locations near high-traffic roads. Also, consider potential adverse consequences related to inability of students to walk/bike to school, etc.</li> </ul>	<ul style="list-style-type: none"> <li>Roads</li> <li>Air Pollution</li> <li>Noise</li> <li>Risk Assessment</li> <li>Water</li> </ul>
<ul style="list-style-type: none"> <li>Distribution centers, bus terminals, bus garages and truck-stops</li> </ul>	<ul style="list-style-type: none"> <li>Facilities with more than 100 trucks/buses per day, or more than 40 refrigerated trucks per day.</li> </ul>	<ul style="list-style-type: none"> <li>Air pollution, including diesel emissions</li> <li>Soil contamination</li> <li>Ground water contamination</li> <li>Surface water contamination</li> <li>Vapor intrusion</li> <li>Heavy truck or bus traffic</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate all major distribution centers within ~½ mile</li> <li>Centers farther away with a high likelihood of accidental releases should also be considered</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate on a case- and site-specific basis. See Exhibit 5 for potential variables and mitigation options.</li> </ul>	<ul style="list-style-type: none"> <li>Risk Assessment</li> <li>Maps and Mapping</li> <li>Vapor Intrusion/ (VOCs)</li> </ul>

# School Siting Guidelines

Feature/Land Use	Description	Potential Hazard(s)	Recommendations		Additional Information <sup>51</sup>
			Screening Perimeter	Evaluation	
Gas stations and other fuel dispensing facilities	<ul style="list-style-type: none"> <li>▪ Large gas station dispense more than 3.6 million gallons per year.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Air pollution</li> <li>▪ Soil contamination</li> <li>▪ Ground water contamination</li> <li>▪ Vapor intrusion into structures</li> <li>▪ Heavy vehicular traffic</li> </ul>	<ul style="list-style-type: none"> <li>▪ Identify and evaluate gas stations and other fuel dispensing facilities within ~1,000 feet of prospective school locations</li> <li>▪ Applies to both onsite as well as adjacent or nearby locations</li> </ul>	<ul style="list-style-type: none"> <li>▪ Evaluate on a case- and site-specific basis. See Exhibit 5 for potential variables and mitigation options.</li> <li>▪ Consult with state, tribal and local authorities for applicable requirements.</li> <li>▪ Consult with local environmental agencies to determine locations with high concentrations.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Air Pollution</li> <li>▪ Risk Assessment</li> <li>▪ Maps and Mapping</li> <li>▪ Underground Storage Tanks</li> <li>▪ Vapor Intrusion/ (VOCs)</li> </ul>
Dry cleaners	<ul style="list-style-type: none"> <li>▪ Facilities using perchloroethylene or similarly toxic chemicals.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Air pollution</li> <li>▪ Soil contamination</li> <li>▪ Ground water contamination</li> <li>▪ Vapor intrusion into structures</li> </ul>	<ul style="list-style-type: none"> <li>▪ Identify and evaluate dry cleaning operations within ~1,000 feet of prospective school locations</li> <li>▪ Applies to both onsite as well as adjacent or nearby locations</li> </ul>	<ul style="list-style-type: none"> <li>▪ Evaluate on a case- and site-specific basis. See Exhibit 5 for potential variables and mitigation options.</li> <li>▪ Consult with state, tribal and local authorities for applicable requirements.</li> <li>▪ Consult with local environmental agencies to determine locations with high concentrations.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Air Pollution</li> <li>▪ Risk Assessment</li> <li>▪ Maps and Mapping</li> <li>▪ Vapor Intrusion/ (VOCs)</li> </ul>

Feature/Land Use	Description	Potential Hazard(s)	Recommendations		Additional Information <sup>51</sup>
			Screening Perimeter	Evaluation	
Other area/small sources	<ul style="list-style-type: none"> <li>Auto body shops, furniture manufacturing and repair, wood product manufacturing or processing; printing, electronics and chip manufacturing; charbroilers, commercial sterilization, back-up generators; small neighborhood metal platers</li> </ul>	<ul style="list-style-type: none"> <li>Air pollution</li> <li>Soil contamination</li> <li>Ground water contamination</li> <li>Surface water contamination</li> <li>Odors</li> <li>Vapor intrusion into structures</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate other small sources within ~1,000 feet of prospective school locations</li> <li>Applies to both onsite as well as adjacent or nearby locations</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate on a case- and site-specific basis. See Exhibit 5 for potential variables and mitigation options.</li> <li>Consult with local health and/or environmental agencies to determine locations with high concentrations.</li> </ul>	<ul style="list-style-type: none"> <li>Air Pollution</li> <li>Risk Assessment</li> <li>Maps and Mapping</li> </ul>
Large agricultural growing operations	<ul style="list-style-type: none"> <li>Operations employing aerial pesticide spraying</li> </ul>	<ul style="list-style-type: none"> <li>Air pollution (from volatilization and drift)</li> <li>Soil contamination</li> <li>Ground water contamination</li> <li>Surface water contamination</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate all large agricultural growing operations within ~3 miles</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate on a case- and site-specific basis. See Exhibit 5 for potential variables and mitigation options.</li> </ul>	<ul style="list-style-type: none"> <li>Air Pollution</li> <li>Risk Assessment</li> <li>Maps and Mapping</li> <li>Water</li> </ul>
Large concentrated animal feeding operations	<ul style="list-style-type: none"> <li>Animal feeding operations</li> </ul>	<ul style="list-style-type: none"> <li>Air pollution</li> <li>Soil contamination</li> <li>Ground water contamination</li> <li>Surface water contamination</li> <li>Odors</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate all animal feeding operations within ~1 – 3 miles</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate on a case- and site-specific basis. See Exhibit 5 for potential variables and mitigation options.</li> <li>Consult with local health and/or environmental agencies to determine locations with high concentrations.</li> </ul>	<ul style="list-style-type: none"> <li>Concentrated Animal Feeding Operations</li> <li>Air Pollution</li> <li>Risk Assessment</li> <li>Maps and Mapping</li> <li>Water</li> </ul>

# School Siting Guidelines

Feature/Land Use	Description	Potential Hazard(s)	Recommendations		Additional Information <sup>51</sup>
			Screening Perimeter	Evaluation	
Power lines	<ul style="list-style-type: none"> <li>High voltage power lines more than 50 KV.</li> </ul>	<ul style="list-style-type: none"> <li>Exposure to electromagnetic fields</li> <li>Safety concerns if power lines fall</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate all high voltage power lines within ~500 feet of prospective school locations</li> <li>Applies to both onsite as well as adjacent or nearby locations</li> </ul>	<ul style="list-style-type: none"> <li>Consult with state, tribal and/or local authorities for requirements.</li> <li>Variable, depending on voltage and if lines are above ground or below ground.</li> </ul>	<ul style="list-style-type: none"> <li>Power Lines</li> <li>Electromagnetic Fields</li> </ul>
Cellular phone towers	<ul style="list-style-type: none"> <li>All cellular phone towers and antennas.</li> </ul>	<ul style="list-style-type: none"> <li>Exposure to electromagnetic fields</li> <li>Fall distance of towers</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate cell towers within ~200 feet of prospective school locations</li> <li>Applies to both onsite as well as adjacent or nearby locations</li> </ul>	<ul style="list-style-type: none"> <li>Review and apply Federal Communications Commission regulatory guidance.</li> </ul>	<ul style="list-style-type: none"> <li>Electromagnetic Fields</li> </ul>
Hazardous material pipelines	<ul style="list-style-type: none"> <li>Oil pipelines, high pressure natural gas pipelines, chemical pipelines, high pressure water lines.</li> </ul>	<ul style="list-style-type: none"> <li>Soil contamination</li> <li>Ground water contamination</li> <li>Accidental release/spills of hazardous materials</li> <li>Fire/heat from flammable fuels</li> <li>Flooding/erosion from water</li> <li>Explosion hazard</li> </ul>	<ul style="list-style-type: none"> <li>Identify and evaluate hazardous material pipelines within ~1,500 feet of prospective school locations</li> <li>Applies to both onsite as well as adjacent or nearby locations</li> </ul>	<ul style="list-style-type: none"> <li>No hazardous pipelines on site (except natural gas serving school).</li> </ul>	<ul style="list-style-type: none"> <li>Pipelines</li> <li>Maps and Mapping</li> <li>Water</li> </ul>

**Table 1-1**  
**Recommendations on Siting New Sensitive Land Uses**  
**Such As Residences, Schools, Daycare Centers, Playgrounds, or Medical**  
**Facilities\***

Source Category	Advisory Recommendations
Freeways and High-Traffic Roads	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses within 500 feet of a freeway, urban roads with 100,000 vehicles/day, or rural roads with 50,000 vehicles/day.</li> </ul>
Distribution Centers	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses within 1,000 feet of a distribution center (that accommodates more than 100 trucks per day, more than 40 trucks with operating transport refrigeration units (TRUs) per day, or where TRU unit operations exceed 300 hours per week).</li> <li>• Take into account the configuration of existing distribution centers and avoid locating residences and other new sensitive land uses near entry and exit points.</li> </ul>
Rail Yards	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses within 1,000 feet of a major service and maintenance rail yard.</li> <li>• Within one mile of a rail yard, consider possible siting limitations and mitigation approaches.</li> </ul>
Ports	<ul style="list-style-type: none"> <li>• Avoid siting of new sensitive land uses immediately downwind of ports in the most heavily impacted zones. Consult local air districts or the ARB on the status of pending analyses of health risks.</li> </ul>
Refineries	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses immediately downwind of petroleum refineries. Consult with local air districts and other local agencies to determine an appropriate separation.</li> </ul>
Chrome Platers	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses within 1,000 feet of a chrome plater.</li> </ul>
Dry Cleaners Using Perchloro-ethylene	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses within 300 feet of any dry cleaning operation. For operations with two or more machines, provide 500 feet. For operations with 3 or more machines, consult with the local air district.</li> <li>• Do not site new sensitive land uses in the same building with perc dry cleaning operations.</li> </ul>
Gasoline Dispensing Facilities	<ul style="list-style-type: none"> <li>• Avoid siting new sensitive land uses within 300 feet of a large gas station (defined as a facility with a throughput of 3.6 million gallons per year or greater). A 50 foot separation is recommended for typical gas dispensing facilities.</li> </ul>

**\*Notes:**

- These recommendations are advisory. Land use agencies have to balance other considerations, including housing and transportation needs, economic development priorities, and other quality of life issues.

- Recommendations are based primarily on data showing that the air pollution exposures addressed here (i.e., localized) can be reduced as much as 80% with the recommended separation.
- The relative risk for these categories varies greatly (see Table 1-2). To determine the actual risk near a particular facility, a site-specific analysis would be required. Risk from diesel PM will decrease over time as cleaner technology phases in.
- These recommendations are designed to fill a gap where information about existing facilities may not be readily available and are not designed to substitute for more specific information if it exists. The recommended distances take into account other factors in addition to available health risk data (see individual category descriptions).
- Site-specific project design improvements may help reduce air pollution exposures and should also be considered when siting new sensitive land uses.
- This table does not imply that mixed residential and commercial development in general is incompatible. Rather it focuses on known problems like dry cleaners using perchloroethylene that can be addressed with reasonable preventative actions.
- A summary of the basis for the distance recommendations can be found in Table 1-2.

Table 1-2

Summary of Basis for Advisory Recommendations

Source Category	Range of Relative Cancer Risk <sup>1,2</sup>	Summary of Basis for Advisory Recommendations
Freeways and High-Traffic Roads	300 – 1,700	<ul style="list-style-type: none"> <li>In traffic-related studies, the additional non-cancer health risk attributable to proximity was seen within 1,000 feet and was strongest within 300 feet. California freeway studies show about a 70% drop off in particulate pollution levels at 500 feet.</li> </ul>
Distribution Centers <sup>3</sup>	Up to 500	<ul style="list-style-type: none"> <li>Because ARB regulations will restrict truck idling at distribution centers, transport refrigeration unit (TRU) operations are the largest onsite diesel PM emission source followed by truck travel in and out of distribution centers.</li> <li>Based on ARB and South Coast District emissions and modeling analyses, we estimate an 80 percent drop-off in pollutant concentrations at approximately 1,000 feet from a distribution center.</li> </ul>
Rail Yards	Up to 500	<ul style="list-style-type: none"> <li>The air quality modeling conducted for the Roseville Rail Yard Study predicted the highest impact is within 1,000 feet of the Yard, and is associated with service and maintenance activities. The next highest impact is between a half to one mile of the Yard, depending on wind direction and intensity.</li> </ul>
Ports	Studies underway	<ul style="list-style-type: none"> <li>ARB will evaluate the impacts of ports and develop a new comprehensive plan that will describe the steps needed to reduce public health impacts from port and rail activities in California. In the interim, a general advisory is appropriate based on the magnitude of diesel PM emissions associated with ports.</li> </ul>
Refineries	Under 10	<ul style="list-style-type: none"> <li>Risk assessments conducted at California refineries show risks from air toxics to be under 10 chances of cancer per million.<sup>4</sup></li> <li>Distance recommendations were based on the amount and potentially hazardous nature of many of the pollutants released as part of the refinery process, particularly during non-routine emissions releases.</li> </ul>
Chrome Platers	10-100	<ul style="list-style-type: none"> <li>ARB modeling and monitoring studies show localized risk of hexavalent chromium diminishing significantly at 300 feet. There are data limitations in both the modeling and monitoring studies. These include variability of plating activities and uncertainty of emissions such as fugitive dust. Hexavalent chromium is one of the most potent toxic air contaminants. Considering these factors, a distance of 1,000 feet was used as a precautionary measure.</li> </ul>
Dry Cleaners Using Perchloroethylene (perc)	15-150	<ul style="list-style-type: none"> <li>Local air district studies indicate that individual cancer risk can be reduced by as much as 75 percent by establishing a 300 foot separation between a sensitive land use and a one-machine per dry cleaning operation. For larger operations (2 machines or more), a separation of 500 feet can reduce risk by over 85 percent.</li> </ul>

Source Category	Range of Relative Cancer Risk <sup>1,2</sup>	Summary of Basis for Advisory Recommendations
Gasoline Dispensing Facilities (GDF) <sup>5</sup>	<p>Typical GDF: Less than 10</p> <p>Large GDF: Between Less than 10 and 120</p>	<ul style="list-style-type: none"> <li>Based on the CAPCOA Gasoline Service Station Industry-wide Risk Assessment Guidelines, most typical GDFs (less than 3.6 million gallons per year) have a risk of less than 10 at 50 feet under urban air dispersion conditions. Over the last few years, there has been a growing number of extremely large GDFs with sales over 3.6 and as high as 19 million gallons per year. Under rural air dispersion conditions, these large GDFs can pose a larger risk at a greater distance.</li> </ul>

<sup>1</sup>For cancer health effects, risk is expressed as an estimate of the increased chances of getting cancer due to facility emissions over a 70-year lifetime. This increase in risk is expressed as chances in a million (e.g., 10 chances in a million).

<sup>2</sup>The estimated cancer risks are a function of the proximity to the specific category and were calculated independent of the regional health risk from air pollution. For example, the estimated regional cancer risk from air toxics in the Los Angeles region (South Coast Air Basin) is approximately 1,000 in a million.

<sup>3</sup>Analysis based on refrigerator trucks.

<sup>4</sup>Although risk assessments performed by refineries indicate they represent a low cancer risk, there is limited data on non-cancer effects of pollutants that are emitted from these facilities. Refineries are also a source of non-routine emissions and odors.

<sup>5</sup>A typical GDF in California dispenses under 3.6 million gallons of gasoline per year. The cancer risk for this size facility is likely to be less than 10 in a million at the fence line under urban air dispersion conditions.

A large GDF has fuel throughputs that can range from 3.6 to 19 million gallons of gasoline per year. The upper end of the risk range (i.e., 120 in a million) represents a hypothetical worst case scenario for an extremely large GDF under rural air dispersion conditions.

### Recommendation

- Avoid siting new sensitive land uses within 300 feet of any dry cleaning operation. For operations with two or more machines provide 500 feet. For operations with 3 or more machines, consult with the local air district.
- Do not site new sensitive land uses in the same building with perc dry cleaning operations.

### References

- *Proposed Amended Rule 1421 – Control of Perchloroethylene Emissions from Dry Cleaning Systems*, Final Staff Report. South Coast AQMD. (October 2002)
- *Air Toxic Control Measure for Emissions of Perchloroethylene from Dry Cleaning Operations*. ARB (1994)  
(<http://www.arb.ca.gov/toxics/atcm/percatcm.htm>)
- “An Assessment of Tetrachloroethylene in Human Breast Milk”, Judith Schreiber, New York State Department of Health – Bureau of Toxic Substance Assessment, Journal of Exposure Analysis and Environmental Epidemiology, Vol.2, Suppl.2, pp. 15-26, 1992.
- *Draft Air Toxics “Hot Spots” Program Perchloroethylene Dry Cleaner Industry-wide Risk Assessment Guidelines*. (CAPCOA (November 2002)
- *Final Environmental Assessment for Proposed Amended Rule 1421 – Control of Perchloroethylene Emissions from Dry Cleaning Systems*. South Coast AQMD. (October 18, 2002)

### Gasoline Dispensing Facilities

Refueling at gasoline dispensing facilities releases benzene into the air. Benzene is a potent carcinogen and is one of the highest risk air pollutants regulated by ARB. Motor vehicles and motor vehicle-related activity account for over 90 percent of benzene emissions in California. While gasoline-dispensing facilities account for a small part of total benzene emissions, near source exposures for large facilities can be significant.

Since 1990, benzene in the air has been reduced by over 75 percent statewide, primarily due to the implementation of emissions controls on motor vehicle vapor recovery equipment at gas stations, and a reduction in benzene levels in gasoline. However, benzene levels are still significant. In urban areas, average benzene exposure is equivalent to about 50 in one million.

Gasoline dispensing facilities tend to be located in areas close to residential and shopping areas. Benzene emissions from the largest gas stations may result in near source health risk beyond the regional background and district health risk thresholds. The emergence of very high gasoline throughput at large retail or

wholesale outlets makes this a concern as these types of outlets are projected to account for an increasing market share in the next few years.

### Key Health Findings

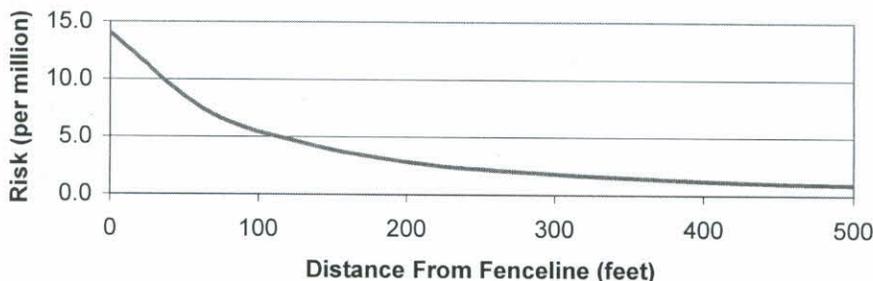
Benzene is a human carcinogen identified by ARB as a toxic air contaminant. Benzene also can cause non-cancer health effects above a certain level of exposure. Brief inhalation exposure to high concentrations can cause central nervous system depression. Acute effects include central nervous system symptoms of nausea, tremors, drowsiness, dizziness, headache, intoxication, and unconsciousness. It is unlikely that the public would be exposed to levels of benzene from gasoline dispensing facilities high enough to cause these non-cancer health effects.

### Distance Related Findings

A well-maintained vapor recovery system can decrease emissions of benzene by more than 90% compared with an uncontrolled facility. Almost all facilities have emission control systems. Air quality modeling of the health risks from gasoline dispensing facilities indicate that the impact from the facilities decreases rapidly as the distance from the facility increases.

Statistics reported in the ARB's staff reports on Enhanced Vapor Recovery released in 2000 and 2002, indicated that almost 96 percent of the gasoline dispensing facilities had a throughput less than 2.4 million gallons per year. The remaining four percent, or approximately 450 facilities, had throughputs exceeding 2.4 million gallons per year. For these stations, the average gasoline throughput was 3.6 million gallons per year.

**Figure 1-6  
Gasoline Dispensing Facility Health Risk  
for 3,600,000 gal/yr throughput**



As shown in Figure 1-6, the risk levels for a gasoline dispensing facility with a throughput of 3.6 million gallons per year is about 10 in one million at a distance of 50 feet from the fenceline. However, as the throughput increases, the potential risk increases.

As mentioned above, air pollution levels in the immediate vicinity of large gasoline dispensing facilities may be higher than the surrounding area (although tailpipe emissions from motor vehicles dominates the health impacts). Very large gasoline dispensing facilities located at large wholesale and discount centers may dispense nine million gallons of gasoline per year or more. At nine million gallons, the potential risk could be around 25 in one million at 50 feet, dropping to about five in one million at 300 feet. Some facilities have throughputs as high as 19 million gallons.

### Recommendation

- Avoid siting new sensitive land uses within 300 feet of a large gasoline dispensing facility (defined as a facility with a throughput of 3.6 million gallons per year or greater). A 50 foot separation is recommended for typical gas dispensing facilities.

### References

- *Gasoline Service Station Industry-wide Risk Assessment Guidelines*. California Air Pollution Control Officers Association (December 1997 and revised November 1, 2001)
- *Staff Report on Enhanced Vapor Recovery*. ARB (February 4, 2000)
- *The California Almanac of Emissions and Air Quality*. ARB (2004)
- *Staff Report on Enhanced Vapor Recovery Technology Review*. ARB (October 2002)

### Other Facility Types that Emit Air Pollutants of Concern

In addition to source specific recommendations, Table 1-3 includes a list of other industrial sources that could pose a significant health risk to nearby sensitive individuals depending on a number of factors. These factors include the amount of pollutant emitted and its toxicity, the distance to nearby individuals, and the type of emission controls in place. Since these types of facilities are subject to air permits from local air districts, facility specific information should be obtained where there are questions about siting a sensitive land use close to an industrial facility.

### Potential Sources of Odor and Dust Complaints

Odors and dust from commercial activities are the most common sources of air pollution complaints and concerns from the public. Land use planning and permitting processes should consider the potential impacts of odor and dust on surrounding land uses, and provide for adequate separation between odor and dust sources. As with other types of air pollution, a number of factors need to be considered when determining an adequate distance or mitigation to avoid odor or

**ATTACHMENT 3**

<b>PARCEL LANDUSE WITHIN 300FT OF GAS STATION</b>	
LANDUSE	NUMBER OF PARCELS
Agricultural Reserve	11
Agriculture	7
Cooperative	1
Cultural	6
Industrial	97
Institutional/Community Facility	106
Multi-Family High Rise	47
Multi-Family Low to Mid Rise	97
Office High Rise	50
Office Low to Mid Rise	252
Open Space/Recreation	110
Other	44
Parking and Transportation	117
Parks	60
Research and Development	2
Retail	1,003
Single Family Attached	584
Single Family Detached	1,112
Utility	19
Vacant	320
Warehouse	71

<b>PARCEL LANDUSE WITHIN 1,000FT OF GAS STATION</b>	
<b>LANDUSE</b>	<b>NUMBER OF PARCELS</b>
Agricultural Reserve	35
Agriculture	28
Cooperative	2
Cultural	20
Industrial	221
Institutional/Community Facility	301
Multi-Family High Rise	111
Multi-Family Low to Mid Rise	399
Office High Rise	132
Office Low to Mid Rise	659
Open Space/Recreation	654
Other	176
Parking and Transportation	295
Parks	264
Research and Development	5
Retail	1,667
Single Family Attached	5,657
Single Family Detached	10,698
Utility	47
Vacant	1,087
Warehouse	235

<b>PLACES WITHIN 300FT OF GAS STATION</b>	
TYPE	AMOUNT
Athletic Courts	9
Business Park	4
Cemetery	2
Fire Station	9
HHS Facility	2
Library	3
Liquor Store	6
Lodging	10
MARC Train Station	1
MC Government	7
Metro Stations	1
Park And Ride Lots	2
Park Facilities	9
Parking Garages And Lots	9
Places Of Worship	12
Police Facilities	5
Polling Place	2
Post Office	13
Private School	7
Recreation Centers	3
Regional Services Centers	2
Shopping Center	42

<b>PLACES WITHIN 1,000FT OF GAS STATION</b>	
<b>TYPE</b>	<b>AMOUNT</b>
Athletic Courts	113
Business Park	50
Cemetery	16
College Or University	1
Elementary Schools	10
Fire Station	17
HHS Facility	4
High Schools	2
Library	9
Liquor Store	19
Lodging	21
MARC Train Station	4
MC Government	39
Metro Stations	5
Middle Schools	5
Park And Ride Lots	7
Park Facilities	42
Parking Garages And Lots	37
Places Of Worship	77
Police Facilities	17
Polling Place	23
Post Office	27

Private School	49
Recreation Centers	7
Regional Services Centers	8
Senior Center	3
Shopping Center	121
Special Schools	2
Swimming Pools	2
YMCA	1

Dear Mr. Russ,

I am writing to urge your support and the support of the Planning Staff for the proposed ZTA 15-07 that is before the County Council.

I am the Chair of the Stop Costco Gas Coalition. During the 5 year fight with Costco over locating a 16 pump gas station proposing to pump 12 million gallons of gas per year a mere 118 feet from residential homes, I did a large amount of research on the potential adverse health effects of evaporative fueling emissions and toxic tailpipe emissions from idling vehicles.

There is significant scientific data in peer reviewed literature that establishes the adverse health effects danger of exposure to these toxic emissions. The greatest health burden is found in the unborn fetus, infants, children, the elderly and those with chronic health problems such as asthma and cardiovascular disease.

The Environmental Protection Agency (EPA), the California Air Resources Board (CARB) and the World Health Organization (WHO) - all support a minimum setback of 300 feet between large gas stations, defined as those pumping 3.6 million gallons of gas per year, and recreation areas, day care centers etc.. All the agencies noted above have expressed concern that the 300 foot minimum might well be inadequate for mega gas stations pumping 3-5 times a greater volume (10 to 18 million gallons per year) and there is support for increasing the buffer zone for these mega stations. Indeed, in a letter from Angelo Bianca, an Air Quality expert at the Maryland Department of the Environment, Mr Bianca notes the difficulties of quantifying the health risks from fueling emissions and tailpipe emissions beyond existing regulation levels and that available tools do not capture well the cumulative effects of multiple toxic air pollutants on public health. Given these uncertainties he states that "the more distance that can be placed between a source and residences and community gathering places is certainly beneficial to minimizing risk."

Since it appears that corporations building these mega gas stations are trying to move into dense, urban, heavily populated areas, I ask again that you support ZTA 15-07 requiring the addition of dwelling units to the existing list of sensitive sites noted in the Montgomery County Zoning Ordinance under Filling Station 2.c. and the increase of the protective buffer to 500 feet .

Thank you for your consideration.

Abigail Adelman  
3206 University Boulevard West  
Kensington, MD

TO: Greg Russ, [gregory.russ@montgomeryplanning.org](mailto:gregory.russ@montgomeryplanning.org)  
FROM: Donna R. Savage, Kensington Heights Civic Association (Land Use chair)  
10804 McComas Ct., Kensington, MD 20895; 301-942-2447  
[DonnaRSavage@gmail.com](mailto:DonnaRSavage@gmail.com)  
DATE: April 28, 2015  
RE: Comments on ZTA 15-07

Please note that the following comments are my own.

ZTA 15-07 proposes two changes to the regulations that were adopted in 2012 by ZTA 12-07: (1) increasing the setback distance for large gas stations (defined as selling at least 3.6 million gallons per year) from the current 300 feet to 500 feet, and (2) adding residential property and certain environmental attributes to the list of sensitive land uses from which a minimum distance would be required. I will leave comment on the increased setback distance to the many others who have greater expertise in this area than I.

It is my opinion that the addition of residential property – “the lot line of any land with a dwelling unit” – to the list of sensitive uses is a common-sense addition to the current regulations for these reasons:

- Students who are protected by the current regulations while at school for part of their day should also be protected when they are at home, which is the majority of their lives.
- Children and babies, those who are frail and/or elderly, and people with existing chronic conditions such as asthma, COPD, and heart conditions are most vulnerable to the pollutants produced by mega gas stations and their vehicle queues. Such individuals are likely to spend the majority of their time in their homes, yet residential property is not currently included in the setback language.
- Children and their parents who are protected when they spend an hour at a park should also be protected for the other 23 hours a day on their home property.

It is also my opinion that the additional environmental attributes proposed to be added by this ZTA would assure protection of the sensitive environmental areas that are cherished and increasingly at risk, especially in the Down county. These areas are critical to safeguarding our quality of life in the many obvious ways that I won't delineate here.

I urge the Planning Staff and the Planning Board to fully support ZTA 15-07, as drafted.

Thank you.

## TESTIMONY WITH RESPECT TO PROPOSED ZTA 15-07

My name is Karen Cordry. I live at 10705 Torrance Drive, Silver Spring, MD, which is a block and a half due south of Westfield Wheaton Mall. Each day I walk to the end of my street, climb the stairs to the Mall, and walk through it, on my way to take the Metro at the Wheaton Station to travel to work. I am currently President of the Kensington Heights Civic Association. Almost exactly three years ago, I was here with respect to consideration of the proposed ZTA 12-07; that ZTA, as originally drafted, was a good first step toward setting proper zoning limits for mega gas stations. Ultimately, though, the final result that passed the County Council was not sufficient to do the job. The current proposed revision would complete the process and ensure that these large stations are not built, literally, in *anyone's* back yard.

### Background:

When the earlier ZTA was being proposed, its opponents argued that it was solely directed at Costco's proposed station at Westfield Wheaton and it was unfair to Costco to consider a ZTA after it had made its proposal. As I and other supporters explained, though, the ZTA would affect any entity that sought to build a "large" station (i.e., one that was designed to pump more than 3.6 million gallons per year). More to the point, until Costco appeared in 2010 and threatened that it would not build its warehouse unless it were allowed to include a 12-million gallon station without complying with the Special Exception process, the County had never confronted a similar request. There were, then and now, only a handful of stations that even approached the 3.6 million gallon size; the paradigm for a station in this County (and the type that the Special Exception requirements envisioned) was a neighborhood station that pumped about 1.5 million gallons a year using 6 to 12 pumps.<sup>1</sup>

The Costco application, on the other hand, represented the first of a new model of gasoline retailing that had been growing steadily throughout the country; i.e., "hypermarkets."<sup>2</sup> These stations were much larger than typical stations, in some cases pumping up to 10, 12, and even 20 million gallons of gasoline. (Of the 5200 such stations in 2014, two-thirds were operated by only five entities – 1220 by Kroger, 1,000 by Walmart, 505 by Sam's Club, 381 by Costco, and 346 by Safeway.) Many such stations, particularly those operated by Costco, had the gas pumps as the sole focus of the station and few other amenities were provided.<sup>3</sup> Almost the entire balance of gasoline sales are associated with stations that have some form of convenience store – from a small area adjoining the cashier to the mega plazas seen at Royal

---

<sup>1</sup> This information is drawn from the discussion of ZTA 12-07 contained in the report by Jeffrey Zyontz.

<sup>2</sup> This segment started in in the late 1990s and grew very rapidly during the 2000s. The growth rate has declined substantially since then and the size of the market is beginning to level off after reaching about 13.8% of the total gasoline market in 2014. Substantial detail about these developments is available through reports prepared by the National Association of Convenience Stores and can be accessed at <http://www.nacsonline.com/YourBusiness/FuelsReports/2015/Pages/default.aspx>, see pages 28 to 30 of the Report. Earlier reports had more details about the development of these hypermarkets.

<sup>3</sup> Costco's model takes this to perhaps the furthest extreme by removing even windshield washer stations lest the time taken to perform that service might slow down the uninterrupted flow of customers through its service lines. (Special Exception Hearing Transcript 7/31/13, pp. 208-10.)

Farms, Sheetz, WaWa stores and the like. The latter stations may or may not meet the definition of “large” stations, based on the traffic at their locations. The size of these stations pumping this quantity of gasoline can easily suggest that their effects, even if of the same qualitative nature as those produced by smaller stations (i.e., traffic, noise, emissions, etc.) would be so quantitatively out of line that it was reasonable to set more stringent limits for such stations.<sup>4</sup> Thus, the supporters of ZTA 12-07 argued that it was a reasonable reason to the advent of such stations to adjust the regulations to take account of the new reality

I testified three years ago that it would benefit all parties to set more specific, defined, and meaningful limits *in advance* for such stations. Doing so would benefit those who proposed to build such stations because it would allow them to know *before* they invested too much time and effort in a project that it would likely be deemed unacceptable. And, it would benefit the community because the proposals that would be most likely to rouse substantial opposition would be ruled out at the drawing board stage before the community had to engage in a substantial effort to fight back against the Special Exception request.

The supporters of ZTA 12-07 agreed that the original 1,000-foot buffer from schools and outdoor recreational facilities was appropriate for those facilities. We also urged then that the ZTA should include homes as well. Absent that inclusion, community residents would be protected only by the happenstance of whether a school or park or swimming pool was located near their homes. In its original form, ZTA 12-07 would have precluded building the proposed Costco station at Westfield Wheaton Mall because it was within 300 feet of the existing Kenmont Swim and Tennis Club. It was also, as originally proposed, about 1300 feet from the Stephen Knolls School, the school designated by the County for its most severely disabled children.

The result of those twin constraints meant the station could not be built anywhere on the back side of the Mall. If the station were moved sufficiently far away from Kenmont to comply with the 1000-foot limit, it would then impinge on the Stephen Knolls School. Thus, while KHCA and other supporters of the ZTA continued to urge that homes logically belonged in the ZTA, the station would still have been precluded under the original draft. But then, the bill was amended at the last minute to reduce the buffer limit to 300 feet, with homes still excluded. Perhaps not surprisingly, that reduced size was sufficient to allow the station to be moved just far enough so that it could meet the 300-foot minimum from the Kenmont pool property line, and just barely meet the minimal terms of the ZTA. On the other hand, it was now only about 850 feet from the Stephen Knolls School property line, but, of course, that was no longer dispositive because the buffer had been reduced to 300 feet on that end as well.

One might have thought logically that, since the proposed station was three times larger than a 3.6-million-gallon station that would trigger the ZTA limits, the buffer zone should also be tripled to provide the same degree of protection to residents of this area as those confronting a

---

<sup>4</sup> As noted in my prior testimony, a water park can be viewed as simply a very large set of swimming pools, but that does not mean it would be unreasonable to place more conditions on them than a neighborhood swim club.

proposed station that barely met the trigger. However, while such arguments could be made in the Special Exception process, they could not serve to stop the proposal at the initial stage.

The Net Result:

Instead, of being able to stop the proposed station at an early stage, it took the opponents to the station 37 days of hearings, 9500 pages of testimony, 650 exhibits, thousands of hours of uncompensated time preparing for and attending the hearing, and well over \$100,000 from the pockets of community members to demonstrate what should have been obvious from day one – that a station of that size did not belong in *anyone's* back yard. To be sure, that process was drawn out far longer than it should have been because Costco's experts engaged in several egregious errors of calculation and kept trying to salvage their work by recasting their analyses from scratch on several occasions. Each of these changes, of course, meant that the opposition had to go back, reanalyze the new report, reengage their experts, and pay their lawyer additional fees for the new hearing days. The net result was that the surrounding community was forced to spend enormous amounts of time and financial and emotional resources to defeat this proposal because the existing standards, even after passage of ZTA 12-07, were too amorphous to allow for a quick and simple resolution.

In addition to the time and effort by the opposition, this process also cost the County the services of its Hearing Examiner for all of those 37 days, plus all of the days he spent preparing for the hearing, as well as the countless hours he devoted to preparing his 260-page report and almost as many pages of appendices. It also cost the County for the services of the court reporter to attend those 37 days of hearings and transcribe the 9500 pages of testimony. And, all of that does not even count the extensive reviews and time spent by the Planning Staff and Planning Board that would not have been needed had an adequate buffer been set in first place that included homes, since that would have made it obvious from the beginning that this station did not belong in this location.

And, finally, this process cost the Applicant a huge amount as well. We do not have precise numbers to be sure, but we have no doubt, based on certain information in the record on the expert fees, as well as the amount of attorney time spent, that Costco must have spent well into the seven figures pursuing an application that a more appropriate ZTA structure would have ruled out from the beginning.

In short, this recent application powerfully illustrates the need to amend the regulations that resulted from ZTA 12-07 to make it unlikely that any such proceeding will occur again. To be sure, any proposed large gas station will still require careful review and there may be some opposition to its placement, but the terms of the revised ZTA should greatly reduce or eliminate the likelihood of community opposition by ensuring that there will be an adequate buffer so it does not unduly intrude on the community.

Proposed ZTA 15-07:

Prior to ZTA 12-07, the requirements applicable to gas stations were either extremely general and subjective, very limited, or both. For instance, one of the few objective requirements was that there be a 20-foot setback for pumps, which is wholly inadequate even for small stations. The Council reasonably recognized that “inherent adverse effects” can interact and exacerbate each other as station sizes increase and that there is a point at which it can be ruled that certain uses are categorically inappropriate in particular locations. The Council also properly decided that each targeted community should not be burdened with proving that categorical decision over and over again at their own expense.

The changes in the current ZTA build on those fundamental decisions and correct the loopholes that were left in the original ZTA. The primary change is the inclusion of homes as a factor that triggers the buffer zone. This is absolutely critical. The original inclusion of schools and outdoor facilities is presumably meant to take into account that children are more sensitive to pollutants than adults, and that individuals running and playing in outdoor recreational facilities may breathe in more pollutants than those at rest. While those factors are true, they in no way suggest that homes should be excluded.

Children typically do not begin attending school until they are at least age 3 or 4 and only spend about 6 to 7 hours a day, at most, in school. Before that age, they stay home – up to 24 hours a day, 7 days a week. The elderly, the frail, the chronically ill, pregnant women – all of these persons may be at home for most or all of their week and they are all more vulnerable to the effects of pollution than those who are healthy and old enough to venture out on a daily basis. It make no sense to protect children for a few hours a day while they are at school but to ignore the greater exposure they may have at home. The same argument can be made for the other groups, all of which fall into the categories of those susceptible to pollution. The same goes for the proximity of a station to outdoor recreational facilities – while users may be there a few hours a day, they are likely to be at their homes for far more of their life.

Nor does pollution disappear once one enters a house. While air conditioning may tend to filter out some particles, it does nothing to change the levels of harmful gases such as nitrogen dioxide that are produced by car engines. Those effects are layered upon other sources of indoor air pollution creating situations that may be even more dangerous than being outside. Costco’s air quality expert conceded that levels of pollutants such as nitrogen dioxide and carbon monoxide would be about the same inside as outside. (Special Exception Hearing Transcript, 9/20/13, pp. 123-25, 202). Exhibits 445 and 446 in those hearings were two studies conducted by Dr. Patrick Breysse that illustrated the respiratory effects of varying levels of pollutants in home exposures (at levels well within the existing EPA standards). In short, the only logical structure for a buffer zone is to include homes – and nothing was put forward at the time of passage of ZTA 12-07 to explain why homes should *not* have been included.

As far as the 500-foot limit, this appears to be a reasonable compromise between the 1,000 feet originally proposed and the 300 feet currently in effect for a limited number of uses. While one cannot provide absolute certainty as to the effects of any given level of emissions on a particular location, it is clear that a larger buffer will provide a larger measure of assurance against harm. With the strong possibility that many proposed stations (and certainly those that Costco may suggest in Montgomery County in the future) may be far larger than the 3.6 million gallons, which is the trigger for setting a buffer zone, the limit should not be set at the lowest level that might be appropriate for the smallest station, since this would leave communities significantly underprotected from the larger stations.

A better margin of safety is also important because mounting evidence shows that health benefits continue to result from reduced exposures even at absolute levels that are well below what was thought to be the case a number of years ago – and well below the current standards set by the EPA. Studies show real-world benefits from reductions in pollution levels that have been taking place in recent years – and adverse effects from pollution that continues to be seen at levels below the existing EPA standards. In one such study (submitted with this testimony),<sup>5</sup> the addition of EZ-Pass technology in New Jersey reduced the levels of idling around toll booths, resulting in an approximately 11-12% decrease in premature births and low birth weights. (Exhibit 443 to the Hearing Examiner Report in S-2863.) Another recent study shows the flip side of the issue: it showed that there were adverse effects on lung function even for *healthy* adults on days where pollution levels were in the “moderate range,” i.e., Code Yellow days.<sup>6</sup> Such days are, by definition, *below* the EPA standards. Background levels for nitrogen dioxide in Montgomery County are generally already at or very close to those “moderate” levels for much of the summer. Addition of pollution from a large gas station can easily push them over that point.

In a very recent study (also submitted herewith), researchers who have been doing work in the Los Angeles area since 1994 were able to chart the improvements in children’s health and lung functioning as pollution has decreased – and to chart that, even now, differences can be seen between the most and least polluted areas even though all areas fall within the EPA standards.<sup>7</sup> In discussing the report, an editorial in the same issue of the *New England Journal of Medicine* concluded (also submitted herewith), “Some have argued that the substantial improvements in air quality over the past 40 years are sufficient to protect public health and that there is little evidence to support more stringent standards. However, the current report and other studies suggest that further improvement in air quality may have beneficial public health effects.”<sup>8</sup>

---

<sup>5</sup> “Traffic Congestion and Infant Health: Evidence from E-ZPass.” *American Economic Journal: Applied Economics*, 2011. Vol. 3, No. 1, 65-90.

<sup>6</sup> “Short-Term Exposure to Air Pollution and Lung Function in the Framingham Heart Study.” *Am. J. Respir. Crit. Care Med.* Vol 188, Iss. 11, pp 1351–1357, Dec 1, 2013.

<sup>7</sup> “Association of Improved Air Quality with Lung Development in Children.” *New England J. Med.* Vol. 372, No. 10, pp. 905-13 (March 2015).

<sup>8</sup> “Cleaner Air, Bigger Lungs.” *New England J. Med.* Vol. 372, No. 10, pp. 970-71 (March 2015).

The EPA is currently in the process of revising its NO<sub>2</sub> standard. It released its second draft of its “Integrated Science Assessment for Oxides of Nitrogen – Health Criteria” (“ISA”) in January 2015. The summary statement prepared by the EPA for that analysis is attached at the end of this paper. It states: “Results from recent studies *strengthen the body of evidence indicating that short-term exposure to NO<sub>2</sub> can cause respiratory effects*, in particular, effects related to asthma exacerbation.” A few pages from the report are also submitted herewith – while the report is still in draft form and is not yet ready to be cited as authoritative, it is worth looking at it to see the direction in which the EPA is moving and the types of studies that it is finding.<sup>9</sup>

In view of all of the types of studies cited above (and a huge number of additional studies being reviewed by the EPA), it would make no sense for the County to leave its current standards as is and then be forced to revisit them again after the standard is revised, probably in about 18 months under the current timetable. More to the point, a proper sense of precaution strongly suggests that the County seek to eliminate the possibility of unnecessary risk by creating an adequate buffer zone that will minimize the potential for such harms.

In that regard, we are again at a point where the County can seek to act in advance of another proceeding like the one that was just concluded. No other community should be forced to face the staggering burden that the Opposition, including KHCA, took on in order to prove the levels of exposure and harm that the neighborhood would face – and to do so without any help from the County or State health officials, all of whom claimed to have inadequate resources to address these issues. If they did not, surely an individual community does not have those resources either, but Kensington Heights and Stephen Knolls and the Kenmont Swim & Tennis Club did not have the option to not face the issue. It was thrust upon them and they had no choice but to seek to defend their community from the adverse consequences of having a mega station built literally in their back yards.

When I gave my first testimony regarding the proposed Costco station in 2010 – when Costco was seeking its own ZTA to exempt itself from the Special Exception process – I looked at the wall behind where the Council was sitting and read out the County motto – “Gardez bien.” I translated that as meaning “take good care” and that is the County’s responsibility to its residents. No community should be beggared in order to contest a facility that has the potential to adversely affect its health. And, even more clearly, no community should have to face such a challenge more than once. As of now, the current zoning ordinance allows an applicant to return in 18 months and file for a new Special Exception without any proof of changed circumstances. The proposed ZTA 15-07 would ensure that the loophole in ZTA 12-07 no longer exists and the Kensington Heights community will not be called upon to fight this battle again.

---

<sup>9</sup> Notably, most of the sources of uncertainty in the report appear to stem from trying to isolate the specific effects of nitrogen dioxide, standing alone, from the overall, clearly observable adverse effects of traffic-related pollution as a whole. Since any gas station will expose those nearby to the full range of such pollution, those concerns by the EPA are irrelevant and it is appropriate to consider the full panoply of harm that the EPA notes.

## The Likely Counter-Arguments by Opponents of the ZTA are Without Merit

We already know what Costco's position is on the ZTA since it has been sending "scare" postcards to its members. In particular, it claims that ZTA 15-07 would "essentially suspend the zoning process" and that it "would keep safe, affordable gas out of Montgomery County."

Those statements are, of course, utter nonsense. Making this adjustment to the current zoning requirements no more "suspends" the zoning process than did the prior ZTA, pursuant to which Costco pursued its Special Exception request through all four levels of County approval, despite the recommendations of denial at each step. What the ZTA does do is set a more reasonable minimum buffer standard for a station of the size and impact that triggers its application. As to the claim that it would keep "safe, affordable gas" out of Montgomery County, leaving aside the egotism of the implied claim that Costco is the only supplier of such gas in the County,<sup>10</sup> the argument is without any merit. It would be valid only if there was nowhere in the County where a party could build a gas station while staying 500 feet from the specific uses.

The idea that, in a county of 491 square miles, no such location exists, is ludicrous.<sup>11</sup> Costco, for instance has been able to find such locations in Beltsville, Frederick, Glenarden, Brandywine, Sterling, Fairfax, Washington, D.C., and many other locations.<sup>12</sup> The County – and its citizens – have no obligation to entertain *every* proposed use, no matter how burdensome, at *every* potential location in the County. Indeed, certain zones in the Takoma Park, East Silver Spring Commercial Revitalization Overlay zone do not allow fueling stations – even by special exception – in areas that "adjoin or confront a residential zone." The proposed ZTA is far less strict. One need only look at satellite mapping of the Upcounty area (the most likely location to build a huge station) to see large tracts of undeveloped land that could easily accommodate the placement of retail development and a gas station – with the station being built more than 500 feet away from existing housing.

Moreover, there is little or no need for additional gas stations in coming years, since even Costco conceded at the Special Exception Hearing that gasoline usage will decline substantially over the next 25 years. As a result, there is little or no need for additional capacity; indeed,

---

<sup>10</sup> Testimony during the Special Exception Hearing indicated that the actual difference in prices between Costco and other stations is often far less than one might expect, is largely related to the pricing of other stations in the particular area, and can easily be exceeded by using some of the gas bonus programs at other retailers.

<sup>11</sup> 491 square miles is approximately 13.7 billion square feet. Costco's proposed special exception in Wheaton would have encompassed 40,000 square feet. It seems likely that somewhere in that 13.7 billion square feet, one could find 40,000 square feet that could meet the ZTA requirements and be compatible with a suitable location for a mega gas station.

<sup>12</sup> New dwellings were built near the Elkridge Costco in recent months. There were no residents, of course, when the buildings were approved so there was no one to raise the issues noted here. Even there, it would appear the distance from the station boundary to the nearest building line is about 450 feet, and the rest are considerably further. At most, a requirement such as this might have required a slight scaling down or revised placement of buildings on the parcel. Although not every Costco gas station is 500 feet away from dwellings, the great majority of them are and there is nothing to suggest that there is no room for any such station in Montgomery County.

existing stations are hurting for business. At most, new stations in the Downcounty area would only serve to replace existing stations; as such, there is no particular need to allow such substitutions to be jammed into areas where there is simply not enough space to provide an adequate buffer zone from existing uses. Conversely, in the Upcounty area, where new developments may be needed, there is no reason to think that a station cannot be rationally situated so it does not impinge on homes; when Costco seeks permission to build in such an area, it will be quite capable of bringing “safe, affordable gas” to Montgomery County.

CONCLUSION:

ZTA 15-07 is a reasonable proposal and is a properly tailored effort to deal with a problem that is likely to continue to confront the County. While the Special Exception process may work reasonably well for approving conditions to tailor usages that are generally acceptable in a given zone, it is not a solution when the usage at issue is categorically inappropriate in certain areas. There is no reason to place the burden on community after community to oppose a facility that should not be built without adequate buffers, and that is all this ZTA proposes. KHCA strongly urges the Planning Board to place its full support behind ZTA 15-07.

## EPA Statement about Ongoing NO2 Rule Revisions

<http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=288043>

### Background:

Oxides of nitrogen are one of six principal (or criteria) pollutants for which EPA has established national ambient air quality standards (NAAQS). For oxides of nitrogen, the NAAQS are specified in terms of nitrogen dioxide (NO<sub>2</sub>). The Clean Air Act requires EPA to periodically review the scientific basis for these standards by preparing an Integrated Science Assessment. These reviews play a significant role in EPA's commitment to ensuring a clean and healthy environment for the public.

The second draft ISA is part of the Agency's periodic review of the primary (health-based) NAAQS for NO<sub>2</sub>. Overall, findings from recent studies strengthen the conclusions from the previous NAAQS review, which was completed in 2010. Results from recent studies strengthen the body of evidence indicating that short-term exposure to NO<sub>2</sub> can cause respiratory effects, in particular, effects related to asthma exacerbation. Recent results also strengthen the evidence that the respiratory effects of short-term NO<sub>2</sub> exposure are independent of the effects of many other traffic-related pollutants. There is now stronger evidence for a relationship between long-term exposure to NO<sub>2</sub> and respiratory effects, particularly the development of asthma in children. Results suggest that short-term exposure to NO<sub>2</sub> may be associated with cardiovascular effects and related metabolic effects and premature mortality and that long-term exposure may be associated with cardiovascular and related metabolic effects, poorer birth outcomes, premature mortality, and cancer; however, it is uncertain whether these effects of NO<sub>2</sub> exposure are independent from the effects of other traffic-related pollutants.

Entire ISA Report is available and can be downloaded from:

<http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=288043#Download>



ideas that work

*Attorneys at Law*

3 Bethesda Metro Center, Suite 460  
 Bethesda, MD 20814  
 www.lerchearly.com

**Patricia A. Harris**

Tel. (301) 841-3832  
 Fax (301) 347-3756  
 paharris@lerchearly.com

---



---

**MEMORANDUM**


---



---

**BY EMAIL**

**TO:** Greg Russ

**FROM:** Pat Harris   
 Mike Goecke  
 Lerch, Early & Brewer, Chartered

**SUBJECT:** ZTA 15-07

**DATE:** April 23, 2015

---

Thank you for meeting with us on April 10, 2015. This memo further explains why ZTA 15-07 is an inappropriate zoning text amendment and should not be adopted.

**1. ZTA 15-07 constitutes unlawful special legislation.**

In April of 2012, the District Council introduced ZTA 12-07, which proposed a 1,000 setback for high-volume gas stations from certain uses, but then amended and passed the amendment to impose a 300 foot setback. The only high-volume gas station being contemplated in Montgomery County was the Costco gas station on the Wheaton Mall site. The County Attorney issued a Memorandum (See Attachment A) concluding that the ZTA was not a proper exercise of the District Council's authority for several reasons, including the ZTA was designed to specially eliminate the proposed Costco station: "The ZTA is narrowly tailored to prohibit a single proposed business and is not rationally related to the furtherance of a legitimate governmental objective."

ZTA 15-07 is equally flawed. The proposed Costco gas station at Wheaton Mall remains the only high-volume gas station contemplated in Montgomery County and ZTA 15-07 is clearly designed to preclude that particular gas station. Moreover, ZTA 15-07 also "moves the goal post" for Costco's special exception request.

The District Council typically avoids legislative changes that would adversely affect a pending application. If Costco appeals, and the appellate courts reject the Board of Appeals decision, ZTA 15-07 would unfairly preclude that station from being built. As the County Attorney pointed out in his 2012 Memorandum, in considering whether a ZTA is unlawful Special Legislation, a factor to consider is “whether the underlying purpose of the legislation is to benefit or burden a particular class member or members.” ZTA 15-07 is designed to prevent the Costco station even if Costco prevailed on appeal. It does not affect any other proposed gas station in the county, and thus imposes an improper burden on Costco.

## **2. Curtailing the expenses of groups opposing conditional use petitions is an invalid basis for the ZTA.**

A sponsor of the ZTA justified the proposal on the grounds it would protect opponents of other proposed high-volume gas stations from having to expend significant funds to fight against such a conditional use. This premise is not correct for several reasons.

*First*, the goal of the conditional use process should be to get the right result, not to make the act of opposing projects inexpensive .

*Second*, imposing a 500 foot setback does not eliminate the need for an applicant to show there will be no adverse health effects. Applicants of future filling stations (and their opponents) will still have to spend time and money debating whether a gas station may cause non-inherent adverse health effects.

*Third*, the groups opposing the Costco station deliberately dragged out the process to drive up the applicant’s costs. The opposition is on record that they chose to lengthen the process to drive up Costco’s costs and to give them more time to mount attacks. The opponents’ cross-examinations of Costco’s experts typically lasted two to three times longer than the expert’s direct testimony. Imposing a greater setback is not relevant to the opponent’s litigation tactics, and, as mentioned above, does not eliminate this part of the conditional use process anyway.

## **3. There is no rational basis for the proposed 500 foot setback.**

The proposed 500 foot setback is totally arbitrary. What is the basis for a 500 foot setback? Has the Council determined that a 500 foot setback is a safe distance? If not, why are they proposing 500 feet rather than some other distance? If they believe 500 feet is a safe distance, does this mean that applicants for future high-volume stations do not have to prove there will be no adverse health effects if they comply with the setback requirements? The proposed 500 foot setback neither guarantees safety, nor protects applicants (or opponents) from having to go through an expensive and time-consuming process.

Even the existing 300 foot setback serves little value and is inconsistent with other portions of the Zoning Ordinance, which *requires no other use* to be setback this far. Are gas stations more impactful than heliports or indoor shooting ranges (both of which are permitted by Conditional Use approval in the GR Zone -- the zoning classification of the majority of the Wheaton Mall site)? Are they more impactful than quarries or landfills? None must be setback

500 feet from the uses in ZTA 15-07. Imposing a 500 foot setback for gas stations would be unprecedented and extreme.

The Council justified imposing a 300 foot setback, in part, because Prince George's County imposes a 300 foot setback on all gas stations, irrespective of their size. The 300 foot setback, however, is not only arbitrary, it is an outlier. No other jurisdictions in Maryland -- including jurisdictions where Costco gas stations already exist -- have setbacks greater than 30 feet.

We also examined zoning restrictions in four jurisdictions known for adopting laws and policies protective of the environment: Denver, Colorado; Portland Oregon; Eugene, Oregon; Seattle, Washington; and Riverside, California. None have a setback requirement greater than 30 feet. In addition, all of those jurisdictions have a high volume gas station. What does Montgomery County know that these environmentally protective governments do not?

The purported basis for ZTA 15-07 is the potential health risks associated with a high volume station, but there is no data to support this premise. In 2012, the County Attorney acknowledged, "there is a paucity of data documenting the health effects of gas stations and the existing studies do not relate their findings to the size of the gas station." Since 2012, there are no new studies establishing adverse health effects from gas stations. In the Costco special exception case, the Zoning Hearing Examiner *did not* find that the proposed station would cause adverse health effects. The Hearing Examiner merely found that Costco failed to meet its burden and prove that the station would not cause a risk of adverse health effects.<sup>1</sup> Critically, Costco provided evidence that the gas station would not exceed the Environmental Protection Agency's National Ambient Air Quality Standards, which are designed to protect sensitive populations. There is no scientific justification to impose a 500 foot setback.

#### **4. The existing conditional use provisions provide adequate safeguards.**

In 2012, Staff recommended denial of ZTA 12-07 because "the existing special exception process provides adequate standards and requirements to address issues that potentially could impact properties near a proposed gas station. The public input requirement of the special exception process further provides opportunity to address concerns unique to a particular site." Just as there was no basis for the setback in 2012, there continues to be no basis for it today. The parties in the Costco case presented evidence and the Hearing Examiner concluded that, based on the unique circumstances at this location, the station was incompatible with the surrounding neighborhood. It was the *totality of the circumstances* -- and not merely distance -- that led to his conclusion.

The conditional use process allows a Hearing Examiner to evaluate each site individually based on the totality of the circumstances and determine whether a proposed gas station is compatible with the surrounding neighborhood. In Costco's special exception case, after extensive evidence and testimony, the Hearing Examiner recommended that the Board of

---

<sup>1</sup> The ZHE stated "these repeated changes, as well as inherent *uncertainties* in the modeling process left a prediction of the *likely* levels of NO<sub>2</sub> and PM<sub>2.5</sub> *close enough* to the impactful level to make the *likely* health effects *debatable*" (Report at 162).

Appeals deny Costco's petition, and the Board of Appeals adopted his recommendation. This shows there are adequate safeguards in place to protect the public. Absent compelling evidence, there is no reason to arbitrarily increase the setback, which is already uncommon and restrictive, to 500 feet.

If the Council is relying on the Costco case to justify a 500 foot setback for all high volume gas stations, this is misguided. The Zoning Hearing Examiner emphasized throughout his report that his findings were limited to this gas station in this neighborhood, and that "each special exception case is site-specific." The Hearing Examiner did not address what potential health effects are at 300 feet, 500 feet, or any other distance. His report provides no basis to impose a uniform 500 foot setback.

#### **5. Suggested ways for ZTA 15-07 to provide real benefits.**

The irony of the District Council proposing a 500 foot setback in the wake of the Costco case is that Costco operates some of the cleanest, safest, and technologically state-of-the art gas stations in North America. If the District Council is concerned about the health effects from gas stations, and is not simply interested in prohibiting the Costco gas station, we recommend adopting legislation that applies all stations, and that provides real benefits to public health and safety. These measures could include: requiring redundant oil/water separator systems; using double-walled tanks and pipes; utilizing an arid permeator that captures over 99% of the hydrocarbons released from the underground storage tanks and directs them back into the tanks; and requiring underground and off-site monitoring. Costco employs all of these safety features, and has a virtually spotless environmental record since it began selling fuel in the mid-1990s. There are numerous, older stations throughout the County located near wetlands, streams, river flood plains or environmentally sensitive areas that employ none of Costco's standard safety measures.

#### **6. ZTA 15-07 is ambiguous and may have unintended consequences.**

The current draft of ZTA 15-07 is also flawed because it applies to all gas stations even though it is only intended to thwart the Costco (and ostensibly similar) gas stations. ZTA 15-07 applies to gas stations "designed to sell 3.6 million gallons" of gas. But gas stations are not "designed" to sell any specific number of gallons, and virtually any station in the county can sell 3.6 million gallons of gas. The only reason the Costco stations sell more gas than many other stations is that more people want to buy gas at Costco. People like to buy gas at Costco because it provides exceptional value. Costco gas is of a high-quality and is affordable. Costco stations are clean and safe. If other stations offered what Costco does, they would sell more gas, too.

During the Costco special exception hearing, a representative of the Freestate at 11295 Veirs Mill Road testified that the Freestate sells approximately 3.3 million gallons a year. In response to whether the nearby residents (located just 60 feet away from the station with only a six foot high fence serving as a buffer), ever had any issues with the Freestate, the representative responded that the nearby residential neighbors had never complained about any aspect of the station. Would ZTA 15-07 force this station (or other existing stations) to shut down?

Crudely applying a uniform 500 foot setback would also prohibit high volume gas stations in otherwise appropriate locations. Examples include the intersections of the Beltway and New Hampshire Avenue, or New Hampshire Avenue and Columbia Pike, or near the Airpark or within the commercial areas in Germantown. If the Council is concerned about emissions, then why are homes and playgrounds allowed so close to heavily-trafficked roads? The stigma placed on high volume gas stations does not withstand scrutiny and contradicts how the Zoning Ordinance treats all other conditional uses in the County.

We hope this information is helpful to you for your evaluation of ZTA 15-07. If you have questions, please contact me.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Marc P. Hansen  
County Attorney

**MEMORANDUM**

July 18, 2012

TO: Isiah Leggett  
County Executive

VIA: Marc P. Hansen *MPH*  
County Attorney

FROM: Clifford L. Royalty *CLR*  
Chief, Division of Zoning, Land Use, & Economic Development

RE: Zoning Text Amendment 12-07, Special Exceptions – Automobile Filling Station

You have requested our opinion as to whether ZTA 12-07 is legal. We have concluded that it is not.

**Opinion**

ZTA 12-07 is not a proper exercise of the District Council's authority. The ZTA is narrowly tailored to prohibit a single proposed business and is not rationally related to the furtherance of a legitimate governmental objective.

**Background**

On April 17, 2012, the District Council introduced ZTA 12-07. The ZTA proposes to amend the special exception standards for automobile filling stations to, in pertinent part, prohibit "a new automobile filling station designed to dispense more than 3.6 million-gallons per year" from locating within "1,000 feet from any public or private school or any park, playground, hospital, or other public use, or any use categorized as a cultural, entertainment and recreation use."

The ZTA was accompanied by a memorandum dated April 13, 2012, from Council staff. In the memorandum, Council staff states that the "size and distance standards" proposed by the ZTA "would implement the Environmental Protection Agency's recommendation for school siting." The memorandum also notes that, under existing law, in reviewing a special exception

Isiah Leggett  
July 18, 2012  
Page 2

application, the Board of Appeals must consider the impact on traffic movements at the site of a proposed automobile filling station.

On June 19, 2012, the Council conducted a public hearing on the ZTA. A focal point of the testimony was an automobile filling station that Costco proposes to build at Westfield Mall in Wheaton. There was much discussion of the ZTA's intended impact on the Costco station. There was also testimony that the ZTA would apply only to the proposed Costco station.

The Costco station was referenced elsewhere. By a memorandum dated July 5, 2012, the directors of the Department of Health and Human Services and of the Department of Environmental Protection responded to "the County Council's request for information . . . on the potential health risks associated with the proposed Costco gas station in Wheaton." The directors advised that they do not have the means or expertise to identify, and isolate, any adverse health effects caused by the Costco station.

On July 9, 2012, the Planning, Housing and Economic Development Committee took up the ZTA. For that session, Council staff prepared another memorandum, dated July 5, 2012, that discussed the regulation of automobile filling stations (or "gas stations"), in the County and in other jurisdictions. Expanding upon the theme of the April 13 memorandum, the July 5 memorandum noted that there is evidence that gas stations create health risks and concluded that there is a "rational basis for treating gas stations pumping more than 3.6 million gallons per year differently from other stations." But the memorandum also noted that there is a paucity of data documenting the health effects of gas stations and that the existing studies do not "relate their findings to the size of the gas station." Also, the memorandum acknowledged that the ZTA would adversely affect Costco's pending application for special exception approval of its automobile filling station.

### Discussion

#### Due Process and Equal Protection

Article 24 of the Maryland Declaration of Rights and the 14th Amendment to the United States Constitution prohibit statutory classifications that are arbitrary or discriminatory. See *Kane v. Board of Appeals*, 390 Md. 145, 887 A.2d 1060 (2005). Article 24 states that

no man ought to be . . . disseized of his freehold, liberties or privileges, or outlawed or exiled or, in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the Land.

*Md. Const. Declaration of Rights, art. 24.*

Isiah Leggett  
July 18, 2012  
Page 3

Section I of the 14th Amendment contains both a due process clause and an equal protection clause. The due process clause provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of the law." *U.S. Const. amend. XIV, § 1*. Article 24 is the "state constitutional compliment to the Fourteenth Amendment's Due Process Clause." *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635, 643, 675 A.2d 995, 999, n: 8 (1996), *aff'd* 349 Md. 499, 709 A.2d 142 (1998).

When a statute is challenged under Article 24 and the 14th Amendment the courts consider whether the statute, "as an exercise of the state's police power, provides a real and substantial relation to the public health, morals, safety, and welfare of the citizens of this state." *Maryland Board of Pharmacy v. Sav-A-Lot*, 270 Md. 103, 106, 311 A.2d 242, 244 (1973). The courts acknowledge that the "wisdom or expediency of a law adopted in the exercise of the police power of the state . . . will not be held void if there are any considerations relating to the public welfare by which it can be supported." *Id.* But the courts have cautioned that "if a statute purporting to have been enacted to protect the public morals or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is our duty to so adjudge and thereby give effect to the Constitution." 270 Md. at 106-107, 311 A.2d at 244. Thus,

in restricting individual rights by exercise of the police power neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors or for their benefit. Such action is arbitrary and unlawful, i.e., contrary to Art. 23 of the Declaration of Rights<sup>1</sup>. . . .

*Benner v. Tribbit*, 190 Md 6, 20, 57 A.2d 346, 353 (1948).

In a zoning context, the Court of Appeals has stated that

there is a wide difference between exercise of the police power in accordance with a comprehensive zoning plan, which imposes mutual restrictions and confers mutual benefits on property owners, and arbitrary permission to A and prohibition to B to use their own property, at the pleasure of neighbors or at the whim of legislative or administrative agencies.

*Id.*

As is noted above, Section I of the 14th Amendment contains an equal protection clause. That clause ensures that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 1*. "Although the Maryland Constitution

---

<sup>1</sup> Former Article 23 of the Declaration of Rights is now Article 24.

Isiah Leggett  
July 18, 2012  
Page 4

does not contain an express guarantee of equal protection of the laws, it is well established that Article 24 embodies the same equal protection concepts found in the Fourteenth Amendment to the U.S. Constitution." *Verzi v. Baltimore County*, 333 Md. 411, 417, 635 A.2d 967, 970-971 (1994).

Court review of equal protection claims is analogous to that applied to due process claims. The Maryland courts have "traditionally accorded legislative determinations a strong presumption of constitutionality." *Verzi*, 333 Md. at 419, 635 A.2d at 971 (quoting *State Board of Barber Examiners v. Kuhn*, 270 Md. 496, 507, 312 A.2d 216, 222 (1973)). But "if a statute purporting to have been enacted to protect the public health, morals, safety and welfare has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is [the court's] duty to so adjudge and thereby give effect to the Constitution." *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496, 511, 312 A.2d 216, 225 (1973); see also, *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936). The "decisive question, then, is whether the means selected . . . bear a real and substantial relation to the object sought to be attained." 270 Md. at 512, 312 A.2d at 225. The Maryland Court of Appeals has quoted, favorably, the Supreme Court, to wit:

The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives -- such as a bare . . . desire to harm a politically unpopular group, -- are not legitimate state interests:

*Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372 (1993) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-447 (1985) (internal citations omitted)).

#### Uniformity

The source of the County's zoning authority is the Regional District Act. See *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977), cert. denied 434 U.S. 1067 (1978). Section 8-102 of the Regional District Act contains a "uniformity requirement" which states that "all regulations shall be uniform for each class or kind of building throughout any district or zone . . ." The uniformity clause derives from a provision in a model zoning code that was intended "to give notice to property owners that there will be no improper discriminations." *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. at 719, 376 A.2d at 501. "The uniformity requirement does not prohibit classification within a district, so long as [the classification] is reasonable and based upon the public policy to be served." *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. at 720, 376 A.2d at 501.

Special Legislation

Article III, § 33 of the Maryland Constitution states:

... And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law. The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable.

*Md. Const. art. III, § 33 (2002).*

Although this prohibition on special legislation expressly applies to the General Assembly, it has been construed to apply to municipalities. *Mears v. Town of Oxford*, 52 Md. App. 407, 420, 449 A.2d 1165, 1174 (1981), *cert. denied*, 294 Md. 652 (1982).

In *Montague v. Maryland*, the court stated that the "object" of the prohibition is to

prevent or restrict the passage of special, or what are commonly called *private Acts*, for the relief of particular named parties, or providing for individual cases. In former times, as is well known and the statute books disclose, Acts were frequently passed for the relief of named individuals, such as sureties upon official bonds, sheriffs, clerks, registers, collectors, and other public officers, releasing them absolutely, and sometimes conditionally from their debts and obligations to the State. The particular provision now invoked was aimed against the abuses growing out of such legislation, and its object was to restrain the passage of *such Acts*, and to prevent the release of debts and obligations in particular cases, and in favor of particular individuals unless recommended by the Governor or the Treasury officials.

54 Md. 481, 490 (1880); *see also*, *Potomac Sand and Gravel Company v. Governor of Maryland*, 266 Md. 358, 378, 293 A.2d 241, 251 (1972).

Lacking a "mechanical rule for deciding" special legislation cases, the courts have devised a list of relevant factors, though none is "conclusive." *Cities Service Company v. Governor*, 290 Md. 553, 567-570, 431 A.2d 663, 672-673 (1981). These factors include "whether 'the underlying purpose of the legislation is to benefit or burden a particular class member or members'; whether particular people or entities are identified in the statute; and what 'the substance and practical effect' of a statute is and not simply its form." *State v. Burning Tree Club*, 315 Md. 254, 274, 554 A.2d 366, 376, *cert. denied*, 493 U.S. 816 (1989) (internal citations omitted). The

Isiah Leggett  
July 18, 2012  
Page 6

prohibition on laws that provide for "individual cases" or benefit a "particular class" is not to be applied too literally. That prohibition does not invalidate a law "intended to serve a particular need, to meet some special evil, or to promote some public interest, for which the general law is inadequate . . ." *Mears v. Town of Oxford*, 52 Md. App. 407, 419, 449 A.2d 1165, 1173 (quoting *Norris v. Mayor of Baltimore*, 172 Md. 667, 683, 192 A. 531 (1937)).

The ZTA is Unlawful

It is apparently undisputed that the ZTA would apply only to the Costco station and that it would prohibit that station. It also appears, to the detriment of the ZTA, that the ZTA was intended to prohibit the Costco station and cause its pending application for a special exception to be denied. The legislative record and the ZTA both support that conclusion.

As has been discussed, there is an undue focus in the legislative record on the proposed Costco gas station. The Council, apparently, asked for a review of the health effects of the Costco gas station (which is proposed for a commercial area where more than a few gas stations and automobile service facilities already exist). The size and siting standards proposed by the ZTA are suspiciously narrow. The ZTA is presumably intended to protect the public from the health risks and traffic congestion generated by larger gas stations. But there is a dearth of evidence that a station that is "designed to dispense more than 3.6 million gallons per year . . ." generates greater health risks, or traffic impacts, than any of the existing (or any future) gas stations (or automobile service facilities) in Montgomery County or in Wheaton. The Environmental Protection Agency's school siting guidelines do not advocate for, or support, a prohibition on gas stations, of any size, within 1,000 feet of places of assembly. If health risks and traffic are truly a concern, then the ZTA would broadly apply to all gas stations. And the "general law," meaning the existing special exception standards, is more than adequate to the task of addressing the concerns that allegedly underlie the ZTA. A court would find it particularly troubling that the ZTA is seemingly intended to deny Costco the opportunity to prove that its pending special exception meets the law.

In violation of the foregoing legal limits on the District Council's authority, the ZTA creates statutory classifications that are arbitrary and that are not substantially related to the public welfare. We do not believe that the ZTA would be upheld by a court of law.

Please contact us if you would like to discuss our opinion.

Cc: Kathleen Boucher, Assistant Chief Administrative Officer