

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING COUNTY

ESTATE OF RALPH F. NIENABER,
Petitioner,

vs.

CITY OF KIRKLAND, a Washington
municipal corporation; and COSTCO
WHOLESALE CORPORATION, a
Washington corporation,

Respondents.

No. 09-2-02214-3 SEA

LAND USE PETITION

(LUP 2)

Pursuant to chapter 36.70C RCW, the Land Use Petition Act, Petitioner, acting by and through its attorney Gregory S. McElroy and the McElroy Law Firm, PLLC brings the following land use petition against Respondents:

(1) **The name and mailing address of the petitioner:**

The Estate of Ralph F. Nienaber
Michael N. Nienaber, Personal Representative
7829 NE 14th Street
Medina, WA 98039

(2) **The name and mailing address of the petitioner's attorney:**

Gregory S. McElroy
McElroy Law Firm, PLLC
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Seattle, WA 98103

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1 **(3) The name and mailing address of the local jurisdiction whose land use decision is**
2 **at issue:**

3 City of Kirkland
4 123 Fifth Avenue
5 Kirkland, WA 98033-6189

6 **(4) Identification of the decision-making body or officer, together with a duplicate**
7 **copy of the decision, or, if not a written decision, a summary or brief description**
8 **of it:**

9 Kirkland City Council
10 City of Kirkland
11 City Hall
12 123 Fifth Avenue
13 Kirkland, WA 98033-6189

Kirkland ordinances 4168 and 4169 adopted December 16, 2008, attached.

14 **(5) Identification of each person to be made a party under RCW 36.70C.040(2) (b)**
15 **through (d):**

16 City of Kirkland
17 123 Fifth Avenue
18 Kirkland, WA 98033-6189

19 Costco Wholesale Corporation
20 999 Lake Drive
21 Issaquah, WA 98027

22 **(6) Facts demonstrating that the petitioner has standing to seek judicial review**
23 **under RCW 36.70C.060:**

24 Petitioner owns property adjacent to Costco Wholesale and in the same planning
25 subarea as Costco Wholesale. Petitioner's land is directly affected by the decision
and impacted by the Costco Wholesale development.

Petitioner appeared and provided factual testimony against the subject land use
decision. Petitioner's property and interests are within the zone of interests that
Kirkland was required to consider, including traffic impacts, lack of infrastructure for
roads and drainage, violation of the appearance of fairness doctrine, and failure of
Kirkland to engage in a lawful process for a site-specific rezone or variance provided
by City code and State law.

The reversal of the City of Kirkland's decision and the denial of the illegal spot
rezone granted to Costco Wholesale will provide a complete redress to Petitioner.

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(7) A separate and concise statement of each error alleged to have been committed:

- a. The Kirkland City Council engaged in an unlawful procedure and failed to follow the proscribed process by granting a site-specific spot rezone and variance to Costco Wholesale purportedly as "legislative action" to amend the text of the Kirkland Comprehensive Plan. The action was not the proper subject of legislation because it was not an area-wide rezone.
- b. Kirkland's site specific, private legislation violated the Kirkland municipal code and state law because it did not follow *quasi-judicial* procedures for private, individual, and site-specific land use decisions.
- c. Kirkland's decision violated the appearance of fairness doctrine and the due process rights of adjoining property holders who are denied both procedural and substantive due process.
- d. Kirkland's decision violates the Kirkland Comprehensive Plan including plan elements regarding concurrency, traffic, drainage, public involvement, compatibility, and consistency.
- e. Kirkland's decision was made without site-specific environmental review.
- f. Kirkland's land use decision is an erroneous interpretation of law and/or application of law to the facts.
- g. Kirkland's land use decision is not supported by evidence that is substantial in light of the entire record, the failure to make a proper record, and the lack of opportunity for opponents to present evidence and make a record in a proper *quasi-judicial* forum.
- h. Kirkland's land use decision, which is a site-specific, spot rezone or variance, is outside the jurisdiction of the Kirkland City Council and not the proper subject of legislative action.

(8) A concise statement of facts upon which the petitioner relies to sustain the statement of error:

Jurisdiction and venue is proper in this court. Kirkland is a King County municipality. Costco Wholesale owns the sole property that is subject of the ordinances at issue.

Costco Wholesale applied to Kirkland for a land use decision to allow construction of a regional gasoline filling station prohibited on a specific parcel of land, which was not zoned for that purpose and had recently been rezoned to prohibit that purpose.

1 Rather than applying for a site-specific rezone, variance or other proper approval,
2 Costco Wholesale and Kirkland determined to effect the rezone or variance by
legislative enactment, purportedly as a text change to the comprehensive plan.

3 This text change was solely a private benefit to one party and one parcel and was not
4 "area wide zoning" or similar planning activity authorized for comprehensive
planning or legislative action.

5 Kirkland and Costco Wholesale failed to perform site specific environmental review.

6 Kirkland failed to employ the procedural rights and safeguards of *quasi-judicial*
7 proceedings required by the Kirkland City code and State law for individual and site-
specific project approvals.

8 Legislative action on site-specific project approvals violates procedural safeguards
9 and the appearance of fairness doctrine because it allows uncontrolled and
10 undisclosed *ex parte* contact with decision makers and fails to apply proper decision-
making standards to the facts and evidence in issue.

11 The land-use decision in this case conferred a private benefit on Costco Wholesale
12 and violated the Kirkland Comprehensive plan and development regulations
regarding traffic standards and projected impacts, drainage, infrastructure, odor,
13 noise, light, pedestrian access, and failure to mitigate unacceptable impacts on public
and private property.

14 Kirkland failed to adopt enforceable performance measures, impact review, or meet
15 concurrency requirements for traffic and drainage, intensifying problems already
experienced by adjoining properties and further limiting the development and use of
16 those properties.

17 **(9) A request for relief, specifying the type and extent of relief requested.**

- 18 a. Petitioner asks that the effectiveness of Kirkland City Ordinances 4168 and
19 4169 adopted December 16, 2008 be stayed during the pendency of this
action;
- 20 b. Petitioner requests the court find Kirkland City Ordinances 4168 and 4169
21 adopted December 16, 2008 invalid and of no force or effect;
- 22 c. Should Costco Wholesale decide to pursue the construction of a gasoline
23 filling station on its property, the Petitioner requests the court to direct the
City of Kirkland and Costco Wholesale to invoke the proper *quasi-judicial*
24 procedures under the jurisdiction of the Kirkland hearing examiner or
planning commission, as appropriate; and
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d. For an award of all of Petitioner's attorneys' fees, litigation costs, and the costs and expenses of preparing the record in this matter.

Petitioner reserves the right to amend this petition in response to limited discovery or disclosure of contacts between Costco Wholesale and the City of Kirkland.

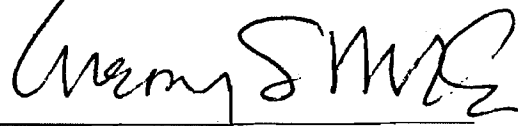
Petitioner reserves the right to seek a *writ of certiorari* to the extent that the Land Use Petition Act does not afford a complete or appropriate remedy.

Petitioner does not waive its right to file a separate challenge under the Growth Management Act to the Central Puget Sound Growth Management Hearings Board.

Petitioner supports intervention by other parties, neighbors, the neighborhood association and community groups adversely affected by the land use decision.

RESPECTFULLY submitted January 6, 2009.

McELROY LAW FIRM, PLLC



Gregory S. McElroy, WSBA No. 15494
Attorney for Petitioner