70396-0

70396-0

No. 70396-0-I

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

Cannabis Action Coalition, *et. al.*,

Appellant,

vs.

City of Kent, *et. al.*,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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3. Identity and Interest of Amicus

Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation organized primarily for educational purposes and the advancement of knowledge in the area of municipal law. WSAMA has no direct interest in this case. It has an interest in the impact that this case has upon municipal zoning authority. WSAMA does not take a position herein upon the parties' federal preemption arguments, and submits that this case can be decided on other grounds. WSAMA also recognizes that preclusion of collective gardens by one city could impact surrounding communities, but it takes no position herein upon "fair share" issues, because they are not squarely before the court in this case.

4. Statement of the Case

Briefly summarized, the facts are as follows: The Kent City Council passed Ordinance 4036 on June 5, 2012, which became effective on June 13, 2012. CP 334–41. Ordinance 4036 added two new sections to the Kent City Code (KCC), which defined collective gardens and prohibited them in all zones of the City. CP 334–41. Ordinance 4036 also declared that a violation of the prohibition constitutes a nuisance, and authorized abatement by the city attorney. CP 334–41.

On June 5, 2012, Appellants filed suit in King County Superior Court

seeking to have Ordinance 4036 declared unconstitutional and in conflict with state law. CP 1–34. On October 5, 2012, the trial court granted the City's motion for summary judgment, issued a permanent injunction enjoining Appellants from participating in a collective garden in the City. CP 553–54; 558–60.

5. Argument

A. Chapter 69.51A RCW does not preempt local zoning authority to regulate and exclude marijuana collective gardens

"Zoning ordinances are constitutional in principle as a valid exercise of the police power." *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505 (1952); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926). Local police powers in Washington are derived from Article XI, Section 11 of the Washington State Constitution which directly grants land use planning and zoning authority to cities. *See Nelson v. Seattle,* 64 Wn.2d 862, 866, 395 P.2d 82 (1964). Local exercise of Article XI, § 11 zoning authority may be limited by legislative enactment. *See Lauterbach v. Centralia,* 49 Wn.2d 550, 554-55, 304 P.2d 656 (1956). However, preemption is not presumed and may only be accomplished by clear and unambiguous legislation. *Nelson,* 64 Wn.2d at 866.

The Washington Legislature understands that local zoning authority

includes the power to both "regulate and restrict" uses. RCW 35.63.080. It confirmed local zoning authority over medical cannabis facilities in 2011. Laws of 2011, ch. 181, § 1102 states in pertinent part:

> Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes. Nothing in chapter 181, Laws of 2011 is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction. If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.

(codified as RCW 69.51A.140(1)). The statute expressly recognizes local zoning authority "pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction" subject to only one limitation that local requirements "do not preclude the possibility of siting licensed dispensers within the jurisdiction."

A statutory phrase is not read in isolation, because "its language takes meaning from the enactment as a whole." *Jane Roe v. Teletech Customer Care*, 171 Wn.2d 736, 747, 257 P.3d 586 (2011) (construing RCW 69.51A.040). The first sentence of RCW 69.51A.140(1) recognizes the authority of cities to adopt and enforce zoning requirements pertaining to "the production, processing, or dispensing of cannabis or cannabis products."

The second sentence says that authority is limited only insofar as cities may "not preclude the possibility of siting licensed dispensers." Despite specific language against preclusion of licensed dispensers, the statute contains no language limiting local zoning authority over any other type of marijuana facility mentioned in Chapter 69.50 RCW. The inclusion of language in RCW 69.51A.140(1) against preclusion of only "licensed dispensers" must therefore be construed to allow cities to preclude cannabis production and processing facilities, collective gardens, and unlicensed dispensaries.

Amicus submits that Laws of 2011, ch. 181 cannot be construed as clear or unambiguous preemption of any part of local zoning power. RCW 69.51A.140(1) purports to require accommodation of licensed dispensaries. However, the Governor vetoed sections of the law that would have established a licensing system for dispensaries. *See* Laws of 2011, ch. 181, §§ 701-705. The Governor's veto message confirmed that the elimination of sections of the law pertaining to dispensary licensing rendered the provision against preclusion of licensed dispensaries to be "without meaning." The Governor further acknowledged that RCW 69.51A.140 "sets forth local governments' authority pertaining to the production, processing or dispensing of cannabis or cannabis products within their jurisdictions." Laws of 2011, ch. 181, veto message. "When vetoing bills passed by the legislature, the

Governor acts in a legislative capacity and as part of the legislative branch of state government. . . . Therefore, we cannot consider the intent of the legislature apart from the intent of the Governor. . . ." *State v. Brasel,* 28 Wn.App. 303, 309, 623 P.2d 696 (1981) (citations omitted). The legislative intent behind Laws of 2011, ch. 181 thus recognizes local zoning authority and indicates that such authority was left intact.

B. Other states recognize that medical marijuana laws do not usurp local zoning authority

Because there is no precedent regarding the extent of local municipalities' zoning authority over medical marijuana collective gardens and dispensaries under Washington State law, it is instructive to consider how other states have handled the issue. This is especially true of California, which has medical marijuana laws that are very similar in scope to Washington's laws.

1. California's medical marijuana laws give local governments the ability to restrict or exclude medical marijuana collective gardens and dispensaries.

In California it is well-settled that state medical marijuana laws do not usurp local municipal zoning authority. California courts, including the California Supreme Court, have held that local governments maintain the ability to restrict where medical marijuana facilities may be located, or to

completely exclude such establishments from their communities. *See City of Riverside v. Inland Empire Patient's Health & Wellness Ctr., Inc.*, 56 Cal.4th 729, 300 P.3d 494, 156 Cal.Rptr.3d 409 (Cal. 2013).

Just this year in *Riverside*, the California Supreme Court held that a local ban on facilities that distribute medical marijuana was not preempted by California's medical marijuana laws. *Id.* at 512. In that case the City of Riverside declared medical marijuana dispensaries and collective gardens to be prohibited land uses within the city and authorized their abatement as public nuisances. *Id.* at 496. The city brought a nuisance action against the defendants, who were operating a medical marijuana dispensary, and the defendants challenged the city's local ban as preempted by both California's Compassionate Use Act of 1996 (CUA) and Medical Marijuana Program (MMP). *Id.* at 496.

The Court first held that California medical marijuana laws do not expressly preempt local zoning authority. *Id.* 300 P.3d at 506–07. It noted that the scope of the CUA and the MMP is "limited and circumscribed." *Id.* at 496. The Court found that the CUA makes no mention of medical marijuana cooperatives, collectives, or dispensaries. *Id.* at 506. "It merely provides that state laws against the possession and cultivation of marijuana shall not apply to a qualified patient, or the patient's qualified caregiver, who

possesses or cultivates marijuana for the patient's medical use upon a physician's recommendation." *Id.* As such, there was no basis for the Court to conclude that the CUA expressly preempts local zoning authority over collective gardens. *Id.* at 506. Likewise, the MMP does not expressly preempt any local zoning ordinance excluding marijuana cultivation and distribution because

> [n]o provision of the MMP explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate cooperative or collective cultivation. . . .

Id. at 506.

The Court also held that California's medical marijuana laws do not impliedly preempt local zoning authority. The Court first found that, due to the limited scope of California's medical marijuana laws, the legislature made no attempt to fully occupy the field of medical marijuana regulation, nor did the legislature partially occupy the field such that there was no room for further local regulation. *Id.* at 507. It also found that the presumption against preemption was, in this situation, additionally supported by the significant interests of local communities that vary from jurisdiction to jurisdiction. *Id.* at 508. Such local interests include the residential character

of many neighborhoods, and that, because marijuana is still illegal under federal and state law, "facilities that dispense medical marijuana may pose a danger of increased crime, congestion, blight, and drug abuse, and the extent of this danger may vary widely from community to community." *Id.* Therefore,

> while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens.

Id. In other situations the Court had held that when a state legislative scheme seeks to promote an activity, local regulations may not completely ban the activity, but the Court found that, in contrast to those laws, the MMP does not create a comprehensive scheme to protect or promote facilities that dispense medical marijuana. *Id.* at 511. The only effect of the MMP's substantive terms is to exempt certain medical marijuana activities from prosecution under specific state criminal and nuisance statutes. *Id.* Because those provisions do not mandate that local jurisdictions allow production or distribution of medical marijuana, the Court held that local decisions to prohibit those activities do not frustrate the MMP's operation. *Id.* In sum, although California's medical marijuana laws permit local authorities to

allow marijuana cultivation and distribution, the limited provisions of such state laws

> neither expressly or impliedly restrict or preempt the authority of local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders. A local jurisdiction may do so by declaring such conduct on local land to be a nuisance, and by providing means for its abatement.

Id. at 512.

When it issued its opinion in *Riverside*, the California Supreme Court affirmed a long line of California Court of Appeals decisions upholding municipal governments' zoning authority over medical marijuana facilities, including both dispensaries and collective gardens. *See Browne v. Tehama*, 213 Cal. App. 4th 704, 153 Cal. Rptr.3d 62 (Cal. Ct. App. 2013) (holding that a county had the authority to impose restrictions on the location and scale of medical marijuana cultivation in addition to those already provided for by state law); *Conejo Wellness Ctr., Inc. v. City of Agoura Hills*, 214 Cal. App. 4th 1534, 154 Cal. Rptr.3d 850 (Cal. Ct. App. 2013) (holding that a city's local ordinance prohibiting medical marijuana dispensaries and collective gardens, and providing that violation of the prohibition is a misdemeanor subject to six months jail time, a $1,000 fine, and summary abatement was not preempted by California's medical marijuana laws); *Cnty.*

of Los Angeles v. Hill, 192 Cal. App. 4th 861, 121 Cal. Rptr. 3d 722 (Cal. Ct. App. 2011) (holding that a county had the authority to impose additional restrictions on where medical marijuana dispensaries may be located and may require them to obtain conditional use permits and business licenses); *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 100 Cal.Rptr.3d 1 (Cal Ct. App. 2009) (holding that a city had the authority to impose a temporary moratorium on medical marijuana dispensaries).

Like California's CUA and MMP, the substantive provisions of Washington's medical marijuana laws are limited in scope. They provide an affirmative defense, or at most immunity from prosecution, for violation of state laws making the use of marijuana illegal. Like California's laws, Washington's medical marijuana statutes do not create an affirmative right for qualifying patients to use marijuana for medical purposes. Additionally, neither regulatory system is extensive. While California's laws only provide one restriction on where medical marijuana facilities may be located, prohibiting retail medical marijuana dispensaries from locating within 600 feet of a school, Washington's laws do not even attempt to regulate where medical marijuana dispensaries or collective gardens may be located. *See Riverside* 300 P.3d at 501. Because of these similarities, this Court should follow California's lead and uphold municipal governments' zoning authority

to control where dispensaries and collective gardens may be located or fully exclude them if the municipality finds that their presence would adversely affect the surrounding community.

2. A Michigan Court of Appeals case invalidating a local ordinance that excluded medical marijuana dispensaries and collective gardens is distinguishable.

In *Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 823 N.W.2d 864, 870 (Mich. Ct. App. 2012), the Michigan Court of Appeals held that the city's attempt to entirely ban the medical use of marijuana was preempted by the Michigan Medical Marihuana Act (MMMA).[1] However, *Ter Beek* is distinguishable. First, the City of Wyoming made *all* medical uses of marijuana a violation of the city's zoning ordinance. *Id.* at 868, 870. That is unlike the case at hand, where the City of Kent only wishes to use its zoning authority to exclude collective gardens. Second, the MMMA provides qualifying patients with immunity from being "subject to arrest, prosecution, or penalty *in any manner*, or denied *any* right or privilege." MCL 333.26424(a) (emphasis added). Accordingly, the *Ter Beek* court found that if the plaintiff was penalized for violating the city's ordinance, that would

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[1] *Ter Beek* was granted review by the Michigan Supreme Court and was argued on October 10, 2013. It remains to be seen how the issue will be resolved by the Michigan Supreme Court, so the issue remains unsettled under Michigan law.

constitute a "penalty in any manner," and thus the penalty would be expressly prohibited by the MMMA and preempted by state law.[2] *Id.* at 869. The language in the MMMA is much broader than the affirmative defense that Washington's medical marijuana laws provide, which is limited to violations of state laws prohibiting the possession, manufacture, or delivery of marijuana. RCW 69.51A.040. Finally, the city's ordinance attempted to completely ban the medical use of marijuana based solely on the use of medical marijuana remaining a criminal activity under the federal Controlled Substances Act (CSA). *Ter Beek,* 823 N.W.2d at 870, 873–74. This was not an attempt to regulate lawful conduct through the city's broad zoning authority or under state law, but instead the City of Wyoming relied exclusively on the authority of the federal CSA. *Id.* This is in contrast to Kent's ordinance, which relies on the city's zoning authority that it has been delegated by state law. CP 335–36. Although Kent's ordinance acknowledges that marijuana remains illegal under the CSA, the ordinance does not purport to rely on federal authority. *See* CP 335–37. Because of these significant differences, this Court should decline to follow *Ter Beek*'s

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[2] Although *Ter Beek* went on to hold that the MMMA was not preempted by the federal Controlled Substances Act, Amicus Curiae does not take a position on the issue of federal preemption of Washington's medical marijuana laws.

holding.

C. Local zoning power includes authority to prohibit undesirable land uses even if they are otherwise legal

"Municipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws." *State v. Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980). Washington courts have recognized that local zoning authority includes more than just the power to prohibit activities declared illegal by the state. For example, the court in *State ex. rel. Randall v. Snohomish County*, 79 Wn.2d 619, 623, 488 P.2d 511 (1971) upheld a county's establishment of a rural use zone that prohibited business and commercial usages from 7/8th of Snohomish County. The court in *Coleman v. Walla Walla*, 44 Wn.2d 296, 299-301, 266 P.2d 1034 (1954) confirmed local authority to prohibit enlargement of existing nonconforming uses. In *Seattle v. Martin*, 54 Wn.2d 541, 543-45, 342 P.2d 602 (1959), the court recognized the authority of a city to affirmatively compel termination of a pre-existing legal use. *See also Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 6-20, 959 P.2d 1024 (1998). "It is a valid exercise of the City's police power to terminate certain land uses which it deems adverse to the public health and welfare within a reasonable amortization period." *Ackerley Communications v. Seattle*, 92

Wn.2d 905, 920, 602 P.2d 1177 (1979).

It is widely recognized that police power may be locally exercised to wholly prohibit otherwise legal uses. *E.g., Edmonds Shopping Ctr. v. Edmonds*, 117 Wn.App. 344, 351-55, 71 P.3d 233 (2003) (holding that a city ban on cardrooms was a reasonable exercise of a local police power). The Supreme Court explained in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974):

> The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

For example, New York appellate courts have upheld prohibitions against otherwise lawful activities when reasonably related to local health, safety, morals, or general welfare concerns. *E.g., Mindel v. Village of Thomaston*, 150 A.D.2d 653, 541 N.Y.S.2d 526 (1989) (prohibiting hotels); *Town of LaGrange v. Giovenetti Ent. Inc.*, 123 A.D.2d 688, 507 N.Y.S.2d 54 (1986) (prohibiting waste disposal stations). Other jurisdictions have similarly held that cities may exclude undesired uses even though they are allowed in other communities. *See Bartolomeo v. Town of Paradise Valley*, 129 Az. 409, 631 P.2d 564, 567-69 (Az. App. 1981); *Lambros, Inc. v. Town of Ocean Ridge*, 392 So.2d 993, 994 (Fla. App. 1981) (disallowing commercial uses from a

town zoned entirely residential).

The same holds true with respect to uses already subject to a complex regulatory scheme and those generally permitted by state law. The court in *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 790-92 (6th Cir. 1996) recognized that a Michigan city could forbid seaplane landing areas from being sited in its jurisdiction even though they are regulated by the Federal Aviation Act. The court in *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521, 530-32 (S.D. Ohio 1984) recognized that an Ohio city was not bound to allow sanitary landfills even though they were generally allowed by state law. *See also Town of Beacon Falls v. Posic*, 212 Conn. 570, 563 A.2d 285, 291-92 (1989).

"It cannot be said that every municipality must provide for every use somewhere within its borders." *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749, 752 (1958); *see also Duffcon Concrete Products v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949). The Oregon Supreme Court recognized in *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965) that local government is responsible for planning within a city in a manner that meets the community needs, and that it is appropriate to eliminate some uses that are not in keeping with a city's character or plans for the future. The court therefore held that "it is within the police power of the

city wholly to exclude a particular use if there is a rational basis for the exclusion." *Harke*, 400 P.2d at 263; *see also Hoeck v. City of Portland*, 57 F.3d 781, 788 (9th Cir. 1995). Other jurisdictions agree. "It is well settled that even a legitimate business or occupation may be restricted or prohibited in the public interest." *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709, 719 (1975); *see also Snow v. City of Garden Grove*, 188 Cal. App. 2d 496, 10 Cal.Rptr. 480, 483-84 (1961).

Amicus submits that the test enunciated by this court in *Edmonds Shopping Ctr. v. Edmonds*, 117 Wn.App. 344, 351-55, 71 P.3d 233 (2003) applies when evaluating local land use bans in Washington. *But see Beaver Gasoline Co. v. Zoning Hearing Board,* 445 Pa. 571, 285 A.2d 501, 504-05 (1971) (establishing a more stringent test for Pennsylvania). First, a ban cannot conflict with some general law. Second, it must be a reasonable exercise of police power. Third, its scope must be local. In addition, the second part of the test is subject to a two-part analysis: (1) the ban must promote public health, safety, peace, education or welfare; and (2) it must bear some reasonable relationship to protection of those interests. *Edmonds Shopping Ctr.*, 117 Wn.App. at 351-53. Amicus acknowledges that *Edmonds Shopping Ctr.* involved a ban expressly authorized by statute, but submits that its police power analysis remains applicable, because local exercise of

Const. art. XI, § 11 authority is not dependent upon enabling legislation. *Hass v. Kirkland*, 78 Wn.2d 929, 932, 481 P.2d 9 (1971).

D. Local zoning decisions are subject to only limited judicial review in Washington

Judicial review of local zoning action is limited. If reasonable minds could differ in finding a substantial relation between a zoning action and public, health, safety, morals or general welfare, the zoning action must be sustained. *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972). The court in *Carlson v. Bellevue*, 73 Wn.2d 41, 45-52, 435 P.2d 957 (1968) reinstated a local zoning boundary that prohibited certain commercial uses on one side of a street while allowing those uses on the other side of the street. The court therein reaffirmed that "[z]oning is a discretionary exercise of police power by a legislative authority.... Courts will not review, except for manifest abuse, the exercise of legislative discretion. . . ." *Carlson*, 73 Wn.2d at 45 (citations omitted), *quoting State ex. rel. Myhre v. Spokane*, 70 Wn.2d 207, 210, 422 P.2d 790 (1967).

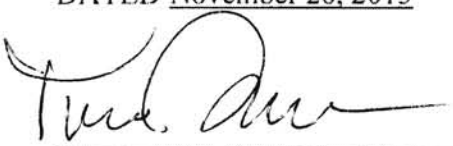
Amicus submits that Kent's ordinance satisfies the *Edmonds Shopping Ctr.* test under Washington's judicial review standard for zoning action. First, it does not conflict with general law. RCW 69.51A.140(1) expressly recognizes local zoning control over medical cannabis facilities and

acknowledges the authority of a city to preclude everything other than currently nonexistent licensed medical cannabis dispensaries. Second, it is a reasonable exercise of police power. The ordinance addresses Kent's express concerns about potential secondary impacts from cannabis facilities and the unsettled interplay between state and federal law. CP 336, ¶¶ D and E. The Governor's 2011 partial veto message validates Kent's concern about the unsettled legal issues. Laws of 2011, ch. 181, veto message. Kent's concerns about secondary impacts presents a "conceivable set of facts" that courts must presume exist in support of Kent's action. *See Edmonds Shopping Ctr.*, 117 Wn.App. at 353-54; *see also City of Riverside*, 300 P.3d at 508 (illustrating conceivable secondary impacts). Third, Kent's ordinance is only local in scope. CP 339-40. Kent has exercised its legislative discretion to exclude collective gardens. CP 334-41. Amicus submits that this Kent's ordinance cannot be considered a manifest abuse of legislative discretion and should be upheld.

5. Conclusion

Amicus curiae requests that this court affirm the order granting defendants' motion for summary judgment, CP 558-60, order granting defendants' motion for a permanent injunction, CP 553-54, and order denying motion to reconsider, CP 643.

DATED November 26, 2013



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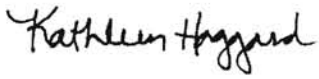

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6. Certificate of Service

I certify that I mailed a copy of the foregoing proposed BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS to: Arthur Fitzpatrick, attorney for City of Kent, at City of Kent, 220 Fourth Ave. S., Kent, WA 98032, and appellants' attorneys: Joseph Broadbent, Attorney at Law, at P.O. Box 1222, Stanwood, WA 98292-1222, Douglas Hiatt, Attorney at Law, at 119 1st Ave. S., Ste. 260 Seattle, WA 98104-3450, John Worthington, Attorney at Law, at 4500 S.E. 2nd Pl., Renton, WA 98059, and David S. Mann, Attorney at Law, at Gendler & Mann LLP, 1424 Fourth Ave., Suite 715, Seattle, WA 98101, postage prepaid, on the date stated below.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

11/26/2013 Walla Walla, WA
(Date and Place)


(Signature)