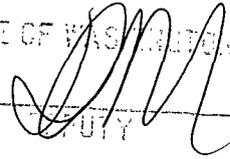


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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
CAUSE NO. 44542-5-II

PIERCE COUNTY SUPERIOR COURT
CAUSE NO. 12-2-09295-3

THOMAS MORAWEK,

Appellant,

v.

CITY OF BONNEY LAKE,

Respondent.

BRIEF OF APPELLANT

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I. IDENTITY OF APPELLANT

Appellant, Thomas Morawek, submits this Brief and respectfully requests that the Court overturn the Hearing Examiner's Dangerous Dog determination.

II. INTRODUCTION

The entire record is void of any evidence or testimony to establish the provocation element of the Dangerous Dog statute. Since his initial opposition to the Dangerous Dog designation, Mr. Morawek challenged the sufficiency of the evidence and argued that there was absolutely no evidence to sustain the designation. Mr. Morawek specifically argued that the City of Bonney Lake ("City") could not establish the provocation element because of the lack of evidence. The record in this case clearly demonstrates that no one witnessed how the incident started, and as a result, the City is entirely unable to prove each of the required elements of the Dangerous Dog statute. The Hearing Examiner's Dangerous Dog Determination was not supported by substantial evidence and must be reversed.

III. ISSUES PRESENTED FOR REVIEW

Whether the Hearing Examiner's decision should be overturned, when its decision on the provocation element was not supported by substantial evidence because no one witnessed how the incident started.

IV. STATEMENT OF THE CASE

A. Relevant Facts of the Case

On July 2, 2011, Mr. Morawek was accompanied by his Labrador, Scout, while he mowed the front lawn of his property.¹ Scout is seven years old and has been trained to stay on Mr. Morawek's property.² As testified to by the owner of the cat, Ms. Strong, Scout had never caused any problem and would remain on Mr. Morawek's property.³

On July 2, 2011 as Mr. Morawek finished mowing his lawn, he noticed that Scout was no longer in the front yard.⁴ Mr. Morawek pushed the lawnmower into the backyard and closed the gate where he anticipated finding Scout.⁵ After Mr. Morawek put the lawnmower away he became aware that Scout was not in the backyard.⁶ Mr. Morawek went back to the front yard and saw Scout sitting on the front lawn.⁷ This entire process took no more than three minutes.⁸

Mr. Morawek called Scout into the house, and as Scout entered the house Mr. Morawek noticed a scratch on Scout's nose.⁹

¹CP 25.

²Id.

³CP 69; p.7:4-7.

⁴CP 25.

⁵Id.

⁶Id.

⁷Id.

⁸Id.

⁹Id.

Mr. Morawek returned to the front yard with a broom to sweep up the stone edging.¹⁰ After Mr. Morawek finished, his neighbor approached and informed him that there had been an incident involving Scout and the neighbor's cat.¹¹

Mr. Morawek looked for the cat, but found no sign of the animal.¹² The next day, Mr. Morawek again looked around the house and shrubs in an effort to locate the cat, but could not find the animal.¹³

B. Procedural History

On July 3, 2011, Animal Control Officer, Nicole Smith, obtained statements from the owner of the cat, Lynn Strong,¹⁴ and Ms. Strong's son, Luke Strong.¹⁵ Ms. Strong's statement confirmed that she did not visibly witness the incident involving Mr. Morawek's dog and her cat.¹⁶ The most Ms. Strong could attest to was hearing some noises.¹⁷ Mr. Strong's statement was equally void of definitive facts concerning the incident. Mr. Strong **did not witness** the beginning of the incident and **could not attest** to the issue of provocation.¹⁸

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ CP 29.

¹⁵ CP 31.

¹⁶ CP 29.

¹⁷ Id.

¹⁸ CP 31.

On July 5, 2011, Officer Smith contacted Mr. Morawek about investigating a complaint.¹⁹ Mr. Morawek received a written warning and was informed that the Animal Control Officer was waiting for a statement from the neighbor.²⁰

On July 7, 2011, Mr. Morawek was served with Dangerous Dog designation paperwork.²¹ Pursuant to BLMC 6.04, following a Declaration of a Dangerous Dog and exhaustion of the appeal process, Mr. Morawek will be required to:

- Pay a \$250 permit fee to the Animal Control Agency;
- Pay \$100 annually to renew the permit to the Animal Control Agency;
- Obtain a Surety Bond or liability insurance in the sum of \$500,000;
- Tattoo or microchip the dog; and
- Pass a sight inspection of his premises.²²

Mr. Morawek would be guilty of a gross misdemeanor and fined if he failed to comply with the above.²³

On July 15, 2011, Mr. Morawek submitted a letter appealing the Dangerous Dog designation to the Bonney Lake Chief of Police.²⁴ In his appeal letter, Mr. Morawek asserted that a Dangerous Dog designation was

¹⁹ CP 117.

²⁰ Id.

²¹ CP 37-39.

²² Id.

²³ Id.

²⁴ CP 25-27.

not appropriate because the express terms of the ordinance/statute could not be met, specifically, (1) there was no physical evidence that any animal was killed; (2) there was insufficient witnesses to support the designation; and (3) there was no evidence to contradict the assertion that any attack resulted because Scout was provoked.²⁵ Pursuant to BLMC 6.04.185, Mr. Morawek paid a \$25.00 fee to have his appeal heard.²⁶ No hearing was conducted.²⁷

In a letter dated September 27, 2011, Mr. Morawek received notice that the Bonney Lake Chief of Police had rejected his appeal.²⁸

On October 5, 2011, Mr. Morawek appealed the Bonney Lake Chief of Police's determination upholding the Dangerous Dog designation.²⁹ Pursuant to BLMC 6.04.185, Mr. Morawek paid a \$75.00 fee to have the appeal heard.³⁰ On March 8, 2012, Mr. Morawek received a letter indicating that his \$75.00 fee would be refunded.³¹

On May 8, 2012, a hearing was conducted before a Deputy Hearing Examiner where live testimony and evidence was presented.³² Mr. Morawek was not represented by counsel at this proceeding.³³ The first

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ CP 41.

²⁹ CP 43-44.

³⁰ Id.

³¹ CP 46.

³² CP 63.

³³ CP 64.

witness called by the City to testify was the owner of the cat, Ms. Strong.³⁴ Ms. Strong **did not see** the incident.³⁵ Ms. Strong did not even see the cat or the dog.³⁶ All of Ms. Strong's conclusions about the incident were based on what her son, Mr. Strong, told her.³⁷ Even more, Ms. Strong went on to testify that her cat was an outdoor animal that came and went as it pleased:

Q. And the other question is: Is your -- was your cat generally an outside cat, came and went as it pleased?

A. Yes.³⁸

The next witness called by the City to testify was Mr. Strong.³⁹ Mr. Strong does not reside with his mother and is not the owner of the cat.⁴⁰ Mr. Strong did **not witness the beginning of the incident and could not attest to the issue of provocation.**⁴¹

Mr. Morawek also testified at the hearing, and provided an honest and forthright description of the events on July 2, 2011.⁴² In addition, Mr. Morawek identified the fatal flaw in the previously entered Dangerous Dog designation:

³⁴ CP 67.

³⁵ CP 68, line: 9.

³⁶ CP 68, lines: 24-25.

³⁷ CP 68, lines: 9, 16-25.

³⁸ CP 70, lines: 18-20.

³⁹ CP 72.

⁴⁰ CP 72, lines: 5-8.

⁴¹ CP 31.

⁴² CP 82.

I'm appealing the police chief's designation based on what I consider key facts in the case and also key provisions in the dangerous dog definition in the Bonney Lake City Municipal Code.

The key things here are that there is no physical evidence of a dead cat or even an injured cat. All there is is a witness statement of one witness who saw -- who saw a portion of the incident and claimed to have seen that the cat was dead from a distance.

The other portion I'm contending here is that there's no proof that this was an unprovoked attack.

To declare my dog as a dangerous dog, the City needs to show that my dog killed an animal in an unprovoked attack. There's no evidence that the animal was killed or the cat was killed, and there's also no evidence that this was an unprovoked attack.⁴³

At the conclusion of the hearing, the Deputy Hearing Examiner rejected Mr. Morawek's appeal and upheld the Dangerous Dog designation.⁴⁴ The Hearing Examiner's decision was **not** supported by substantial evidence and was completely void of any analysis of the provocation element. In fact, the Hearing Examiner stated

"I just think the evidence is clear that the dog attacked this cat and killed the cat on private property, not his own. **How he**

⁴³ CP 84, lines: 9-19; CP 85, lines: 13-17.

⁴⁴ CP 92-93.

got there, I don't know; but he was there and he killed the cat.”⁴⁵

On May 23, 2012, Mr. Morawek filed a Writ of Review in Pierce County Superior Court.⁴⁶

On December 19, 2012, Mr. Morawek filed his memorandum requesting that the Hearing Examiner's Dangerous Dog designation be overturned.⁴⁷ Mr. Morawek reiterated his arguments that the City had failed to meet the required elements of the Dangerous Dog statute, as well as the Hearing Examiner's reliance on inadmissible evidence.⁴⁸

On January 18, 2013, oral argument on Mr. Morawek's Writ of Review was heard before the Honorable Susan K. Serko.⁴⁹ Judge Serko made it clear that she intended to independently review the evidence to make her findings. However, while Judge Serko was extremely thoughtful in her review of the evidence, she made a fatal flaw when she set forth conclusions that were not supported by the evidence. Specifically, Judge Serko interjected an opinion that was not supported by the evidence. Judge Serko stated:

“And then the argument is, is it with provocation or not with provocation? Dog versus cat? I think there is sufficient circumstantial evidence given the relative size of

⁴⁵ CP 93, lines: 6-9.

⁴⁶ CP 1-4.

⁴⁷ CP 5-20

⁴⁸ Id.

⁴⁹ VR 1.

these animals that it would be without provocation.”⁵⁰

There was absolutely no evidence in the record concerning the size of the animals, let alone how the incident between the animals started. Judge Serko inserted her own presumptions about animals, and in doing so highlighted the City’s failure to demonstrate an essential element to prove that Mr. Morawek’s dog should be deemed dangerous. The City had the burden to demonstrate all of the elements of the Dangerous Dog designation; however, **nowhere** in the record did the City prove the provocation element.

On February 15, 2013, Mr. Morawek filed his Notice of Discretionary Review, and subsequently filed his Motion for Discretionary Review on May 24, 2013.⁵¹ Mr. Morawek’s Motion for Discretionary Review requested that review be accepted pursuant to RAP 2.3(d)(4) because the Hearing Examiner departed from the accepted and usual course of judicial proceedings when he made a determination that was not based on substantial evidence. Mr. Morawek argued that the City failed to meet the necessary elements to satisfy the Dangerous Dog statute, including the provocation element, and the Hearing Examiner’s decision was not supported by substantial evidence.

⁵⁰ VR 23:14-17.

⁵¹ CP 183-185.

Oral argument on Mr. Morawek's Motion for Discretionary Review was heard on July 10, 2013. During the hearing, a discussion relating to Downey v. Pierce Cnty.⁵², and specifically the unpublished portion of the opinion that addressed the provocation element of the Dangerous Dog designation, took place.⁵³

In Downey, Heidi Downey's Great Pyrenees-cross dog Blizzard allegedly "grabbed" Tina Steiner's seven pound, Pomeranian Kayla; injuring her so severely that she had to be euthanized.⁵⁴

During the Hearing Examiner Appeal, Steiner was the only person who testified about the attack on Kayla.⁵⁵ She testified that on the morning of the incident, she had turned Kayla loose to allow her to urinate after first looking around and not "see[ing] anything" in the immediate area.⁵⁶ Steiner then turned her back to Kayla to put one of her other dogs back into the dog pen.⁵⁷ While her back was turned, Steiner heard "something," she was not sure if it was Kayla "barking or a yip, but something."⁵⁸ When she turned around, she saw that Downey's "dog had

⁵² 165 Wn. App. 152, 267 P.3d 445 (2011) *review denied*, 174 Wn.2d 1016, 281 P.3d 688 (2012).

⁵³ The analysis of the provocation element in Downey is instructive and is being cited here, similar to the Court's decision on discretionary review, not on the merits, but to bring to the Court's attention its previous analysis on this issue.

⁵⁴ 165 Wn. App. at 156-57, 267 P.3d 445.

⁵⁵ Id. at 158.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

grabbed [Kayla] by the stomach and was running with [her].”⁵⁹ Steiner ran after the dogs yelling, “Kayla,” and the other dog dropped Kayla.⁶⁰

Steiner was unsure where the other dog had come from, but she believed that the attack happened next to her carport.⁶¹ Steiner also indicated on a drawing of the surrounding properties that the attack took place well away from Downey's property, either on or close to an access easement crossing another neighbor's property.⁶²

Pierce County Animal Control Officer Jody Page testified and confirmed that (1) she could not identify the attacking animal based on Steiner's initial descriptions; and (2) Steiner had reported that she did not see or hear the incident start.⁶³

On appeal, Downey challenged the hearing examiner's findings that (1) Blizzard acted without provocation; and (2) the incident occurred while Blizzard was off of Downey's property.⁶⁴ Downey argued that the County did not carry its burden of establishing lack of provocation because Steiner had her back turned when the incident started.⁶⁵

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id. at 159.

⁶⁴ Id. at 171.

⁶⁵ Id.

This Court, on reviewing the facts in Downey determined that Downey was correct that the record did not support a finding that Blizzard acted without provocation.⁶⁶

In the instant matter at the hearing on the Motion for Discretionary Review, Mr. Morawek argued that this Court's analysis of the provocation element under Downey demonstrated a conflict between courts, and therefore warranted acceptance of review pursuant to RAP 2.3(d)(1). Following the hearing at the request of the Court, Mr. Morawek filed a Statement of Additional Authority with accompanying case law to support the proposition that an unpublished opinion, cited in a petition for review, was appropriate to rely upon to demonstrate a conflict between courts.

On July 17, 2013, Court Commissioner Aurora R. Bearse ruled that the Court accepted review under RAP 2.3(d)(1) because the trial court's determination regarding the sufficiency of the evidence on the provocation element was in conflict with a decision of Division Two of the Court of Appeals. The Court reasoned that the trial court's decision that sufficient evidence existed to demonstrate that Mr. Morawek's dog was not provoked, in light of the absence of any witness to the actual attack, conflicted with Downey's holding that:

⁶⁶ Id.

Because no one saw how the incident started, there was no evidence regarding whether Blizzard's apparent attack of Kayla was unprovoked, and the hearing examiner erred in finding that the County had established lack of provocation by a preponderance of the evidence.⁶⁷

As such, the Court accepted review of Mr. Morawek's appeal on the issue of provocation.

V. ARGUMENT

A. **Standard of Review**

The appellate court reviews de novo the Hearing Examiner's decision, not the trial court's decision on review.⁶⁸ The first question is whether substantial evidence supports the Hearing Examiner's findings of fact.⁶⁹ "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."⁷⁰ The Court next reviews de novo whether the findings support the Hearing Examiner's conclusions of law.⁷¹ The Court is to treat any findings of fact or conclusions of law by the trial court made as surplusage.⁷²

Ultimately, this Court must determine whether the Hearing Examiner acted arbitrarily, capriciously, or contrary to law in upholding

⁶⁷ 165 Wn. App. at 171, 267 P.3d 445

⁶⁸ HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 483–84, 61 P.3d 1141 (2003).

⁶⁹ City of Univ. Place v. McGuire, 144 Wn.2d 640, 647, 30 P.3d 453 (2001).

⁷⁰ Holland v. Boeing Co., 90 Wn.2d 384, 390–91, 583 P.2d 621 (1978).

⁷¹ City of Univ. Place, 144 Wn.2d at 652, 30 P.3d 453 (2001).

⁷² Humbert/Birch Creek Constr. v. Walla Walla County, 145 Wn. App. 185, 192, 185 P.3d 660 (2008).

Animal Control's decision. An action is arbitrary and capricious if it is made without consideration of and in disregard of the facts and circumstances.⁷³ In addition, this Court may also reverse the Hearing Examiner's decision when it is "clearly erroneous."⁷⁴

Here, this Court has the ability to review the record and analyze whether the Hearing Examiner's decision should stand. Based on the record before this Court and the lack of evidence on the provocation element, the Dangerous Dog designation should be overturned.

B. The City had the Burden of Proof

Pursuant to BLMC 6.04.010(G), " 'Dangerous dog' means any dog that kills a domestic animal without provocation while the dog is off the owner's property." For a dog to be declared dangerous, it must be proved by a preponderance of the evidence that the dog meets the definition of a "Dangerous Dog."⁷⁵

There is no dispute that the City has the burden of proving all of the elements of the Dangerous Dog statute. However, the evidence in this case is not sufficient to meet the express language of the Dangerous Dog definition. No evidence or testimony was offered to demonstrate the provocation element.

⁷³ Johnson v. Dep't of Health, 133 Wn. App. 403, 414, 136 P.3d 760 (2006).

⁷⁴ Mansour v. King County, 131 Wn. App. 255, 263, 128 P.3d 1241 (2006).

⁷⁵ BLMC 6.04.185(A).

C. No Evidence of Provocation was Offered

The term "provocation" is not defined in the Dangerous Dog statute. In the absence of a specific statutory definition, this Court will give words their ordinary meaning, which it may determine by referring to a dictionary definition.⁷⁶

Black's Law Dictionary (9th ed. 2009), defines the term "provocation" as **1.** The act of inciting another to do something, esp. to commit a crime. **2.** Something (such as words or actions) that affects a person's reason and self-control, esp. causing the person to commit a crime impulsively.

The definition of "provocation" does not take into account the intent of the actor; rather, the definition focuses on the nature of the act itself and the relationship between that act and an outcome. The definition of provocation requires analysis and observation of how an incident began to be able to define, or in our case, establish. In short, a witness would need to observe what happened at the beginning of an event to determine whether the interaction was provoked or not provoked.

⁷⁶ State v. Silva, 106 Wn. App. 586, 591, 24 P.3d 477, 480 (2001); State v. Standifer, 110 Wn.2d 90, 92, 750 P.2d 258 (1988). See also Addleman v. Board of Prison Terms & Paroles, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986) (in an unambiguous statute, the court will give words their plain and obvious meaning); Brenner v. Leake, 46 Wn. App. 852, 854-55, 732 P.2d 1031 (1987).

Here, there are only two individuals that could possibly offer testimony as to the issue of provocation, Ms. Strong and Mr. Strong, and neither saw how the incident started.

Ms. Strong and Mr. Strong's written statements pertaining to the incident are completely void as to how the incident started.⁷⁷ Neither of them saw how the incident started and could offer no evidence on the issue of provocation.

At the hearing before the Hearing Examiner, Ms. Strong testified that she **did not see** the incident.⁷⁸ Ms. Strong did not even see the cat or the dog, rather she heard a noise while sitting on her deck.⁷⁹ At that point, Mr. Strong jumped off of the deck, and all of Ms. Strong's conclusions about the incident are based on what her son told her.⁸⁰ Ms. Strong was not questioned about how the incident began and offered no testimony concerning the same.

Even more, Ms. Strong went on to testify that her cat was an outdoor animal that came and went as it pleased:

Q. And the other question is: Is your -- was your cat generally an outside cat, came and went as it pleased?

⁷⁷ CP 29, 31.

⁷⁸ CP 68, line: 9.

⁷⁹ CP 68, lines: 24-25.

⁸⁰ CP 68, line: 9, lines: 15-25.

A. Yes.⁸¹

Similarly, Mr. Strong testified that he did not witness the beginning of the incident and could not attest to the issue of provocation.⁸² Mr. Strong heard a noise under the deck and went to investigate.⁸³ Mr. Strong went on to testify that after looking under the deck he saw his mother's cat, Oriel, in Scout's mouth.⁸⁴ Mr. Strong concluded his testimony by stating that he then saw Scout run off with Oriel in his mouth.⁸⁵ Again, Mr. Strong was not questioned about how the incident began and offered no testimony concerning the same.

The City cannot establish the provocation element because Ms. Strong and Mr. Strong **did not observe any interaction** between the two animals **before Mr. Strong saw Oriel in Scout's mouth.**

The City had the burden to prove each of the elements of the Dangerous Dog statute; however, the City offered no evidence or testimony on the issue of provocation.

The Bonney Lake City Council purposefully included the element of provocation in setting forth the elements necessary to establish the Dangerous Dog designation. The provocation element cannot simply be ignored or replaced with some other standard. For example, the trial court

⁸¹ CP 70, lines: 18-20.

⁸² CP 31.

⁸³ CP 72, lines: 19-22.

⁸⁴ CP 72, lines: 22-23.

⁸⁵ CP 73, lines: 2-3.

tried to address the provocation element on the basis of the animals' size. Size has nothing to do with provocation. However, the Hearing Examiner did not address the issue of provocation on any substantive level (even after the issue was brought up during Mr. Morawek's argument and rebuttal at the hearing):

"I just think the evidence is clear that the dog attacked this cat and killed the cat on private property, not his own. **How he got there, I don't know**; but he was there and he killed the cat."⁸⁶

The Hearing Examiner acted arbitrarily, capriciously, or contrary to law by upholding Animal Control's decision when there was no evidence, let alone substantial evidence, to support the provocation element. The Hearing Examiner's decision was clearly erroneous and should be overturned.

D. Request for an Award of Fees and Costs

Mr. Morawek respectfully requests an award of reasonable fees and costs pursuant RCW 4.84.350(1). Mr. Morawek is a qualified party pursuant to the RCW 4.84.340(5). Upon overturning the Hearing Examiner's decision, Mr. Morawek will be the prevailing party in a judicial review of an agency action, and thereby entitled to an award of

⁸⁶ CP 93, lines: 6-9.

reasonable attorney fees and costs.⁸⁷ The City was not substantially justified in pursuing the Dangerous Dog designation in light of the fact that there was no evidence of provocation.

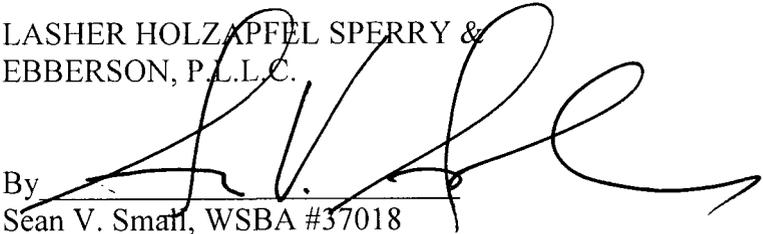
Alternatively, Mr. Morawek requests an award of reasonable fees and costs pursuant RAP 14.2 and RAP 14.3.

VI. CONCLUSION

For all of the foregoing reasons, Mr. Morawek respectfully requests that the Court overturn the Hearing Examiner's Dangerous Dog designation.

Respectfully submitted this 27 day of November, 2013.

LASHER HOLZAPFEL SPERRY &
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⁸⁷ See RCW 34.05.010(3).

CERTIFICATE OF SERVICE

The undersigned, Ellen M. Krachunis, certifies that on the 27th day of November 2013, she caused to be served by legal messenger, the BRIEF OF APPELLANT to the following:

The Court of Appeals
State of Washington, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

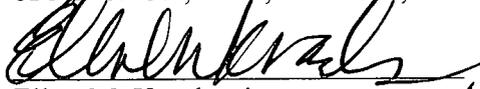
And via e-mail and regular US Mail to the following:

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I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 27th day of November, 2013, at Seattle, Washington.


Ellen M. Krachunis