

NO 74434-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NATE PRUDHON, an individual,  
Appellant/Defendant,

v.

R. THORESON HOMES, LLC, a Washington limited liability company,  
Respondent/Plaintiff,

FILED  
Jul 07, 2016  
Court of Appeals  
Division I  
State of Washington

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RESPONDENT'S BRIEF

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## **I. INTRODUCTION**

The facts are not in dispute. This lawsuit concerns the validity of a sixty-day termination notice (“Termination Notice”) that was served by Denise and Robert Burnside (the “Burnsides”), predecessors-in-interest to respondent/plaintiff R. Thoreson Homes, LLC (“Thoreson Homes”). The Burnsides served the Termination Notice on the appellant/defendant Nate Prudhon (“Prudhon”) who was the sole residential tenant of the single family home located at 728 14<sup>th</sup> Avenue, Seattle, WA 98111 (the “Premises”) when the notice was served. The Termination Notice was served in accordance with the Just Cause Eviction Ordinance, Seattle Maintenance Code (“SMC”) 22.206.160.C.f (the “JCEO”) and terminated Mr. Prudhon’s tenancy on June 30, 2015.

To terminate a monthly tenancy in the City of Seattle (the “City”), an owner must have “just cause” to evict a residential tenant under the JCEO. Subsection f of the JCEO allows an owner to evict a tenant when it “elects to sell” a single family home. To terminate a monthly tenancy under this subsection, an owner must (a) give the tenant at least sixty days’ notice and (b) elect to sell the property, which includes selling the property. The Termination Notice complied with these requirements by giving Mr. Prudhon substantially more than sixty days’ notice and by the Burnsides “electing to sell” the Premises to Thoreson Homes.

On July 1, 2015, Mr. Prudhon failed to vacate the Premises, compelling Thoreson Homes to commence an unlawful detainer action. Prior to trial, which was treated by the parties as a motion for summary judgment, the parties stipulated in the Joint Statement of Evidence (“JSE”) that there were no factual disputes and that the unlawful detainer action concerned a purely legal issue; namely, whether the Termination Notice complied with the JCEO.

The parties submitted briefing and oral argument was held before the Honorable Monica Benton on October 8, 2015. On December 3, 2015, Judge Benton signed an Order Granting the Relief Sought in [Thoreson Homes’s] Complaint for Unlawful Detainer. On December 11, 2015, the King County Superior Court Clerk issued a Writ of Restitution. Shortly thereafter, the King County Sheriff evicted Prudhon from the Premises.

As stipulated by the parties, the sole issue before this Court is whether the trial court properly ruled that the Termination Notice complied with the JCEO. The trial court correctly ruled that the Termination Notice complied with the JCEO and properly awarded Thoreson Homes the relief sought in its complaint, which included possession of the Premises and its costs and attorneys’ fees. This Court should affirm the trial court’s order.

## **II. ASSIGNMENTS OF ERROR**

Thoreson Homes assigns no error to the trial court's order dated December 3, 2015 that awarded it the entire relief sought in the complaint. Thoreson Homes disagrees with Mr. Prudhon's assignments of error and issues on review. They are more properly stated as follows:

1. Whether the trial court properly ruled that the Termination Notice complied with the JCEO where Thoreson Homes's predecessor-in-interest (a) gave Mr. Prudhon more than the statutorily required 60 days' notice prior to terminating his tenancy, and (b) elected to sell a single family residence by selling the Premises to Thoreson Homes?

2. Whether the sole issue before this Court is whether the Termination Notice complied with the JCEO where the parties previously stipulated in the joint statement of evidence that this was the sole issue to be decided by the trial court?

3. Whether the trial court had jurisdiction to issue the order and writ of assistance where the Superior Court has exclusive jurisdiction over unlawful detainer actions and there is no right to appeal a notice of violation or director's order to the Seattle Municipal Court?

4. Whether Mr. Prudhon has standing to appeal the order when possession of the Premises is no longer an issue?

5. Whether this Court should award Thoreson Homes its costs and attorneys' fees incurred in this appeal?

### **III. STATEMENT OF THE CASE**

This appeal concerns the trial court's December 3, 2015 order awarding Thoreson Homes the relief sought in its complaint. Clerk's Papers (CP) 230-232. The parties do not dispute the material and relevant facts of this case and stipulated in the joint statement of evidence that the trial court was deciding a purely legal issue: Whether the notice of termination served by Thoreson Homes's predecessor-in-interest complied with the Just Cause Eviction Ordinance – Seattle Municipal Code 22.206.160.C.f. CP 98. Based upon this agreement, the facts are not construed in favor of one party over the other.

#### **A. Mr. Prudhon's tenancy at the Premises.**

The Burnsidés are predecessors-in-interest to Thoreson Homes and the prior owners of the Premises. On or about May 22, 2009, the Burnsidés and Mr. Prudhon entered into a written lease agreement (the "Lease") for the Premises. CP 103-111. The Lease was for a one year period commencing on July 1, 2009 and expiring July 1, 2010. CP 99. At the expiration of the Lease, Mr. Prudhon became a month-to-month tenant. CP 99.

On or about April 2, 2015, the Burnsidés entered into a purchase and sale agreement for the Premises with Blueprint Capital Services, LLC (“Blueprint”). CP 99. Blueprint later assigned the purchase and sale agreement to Thoreson Homes. CP 99. On April 11, 2015, the Burnsidés transferred the Premises to Thoreson Homes pursuant to a statutory warranty deed (the “Deed”) that was filed with the King County Recorder’s Office on April 17, 2015. CP 115-116.

Shortly after executing the purchase and sale agreement, the Burnsidés served Mr. Prudhon with the Termination Notice in compliance with the JCEO. CP 113. The Termination Notice terminated Mr. Prudhon’s tenancy on June 30, 2015, almost ninety days after he was served with the Termination Notice<sup>1</sup>.

Mr. Prudhon failed to comply with the Termination Notice by refusing to vacate the Premises. Once Mr. Prudhon’s tenancy was terminated at the expiration of the Termination Notice, Thoreson Homes commenced this unlawful detainer action. CP 1-19. The sole defense raised by Mr. Prudhon in his answer is that the Termination Notice did not comply with the JCEO. CP 31-34.

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<sup>1</sup> The JCEO was amended on September 29, 2015 and now requires that an owner give at least 90 days’ notice. When the termination notice was served in this matter, the JCEO only required 60 days’ notice.

**B. The Just Cause Eviction Ordinance.**

For real property located within the City, the JCEO provides the only circumstances under which an owner may terminate a tenant's monthly tenancy and obtain an order of eviction from the court. In 1995, the City enacted Ordinance No. 117942, titled "AN ORDINANCE relating to Just Cause Eviction, amending the definitions in the Housing and Building Maintenance Code, SMC 22.204.200, and amending SMC Section 22.206.160.C to clarify and amend the existing procedures and just causes for eviction, to provide additional just causes for eviction, and to create a private right of action for tenants when evicted under certain just cause provisions." The Ordinance created a new just cause for eviction where an owner "elects to sell" a single family dwelling unit. There is no dispute that the Premises is considered a single family dwelling unit under the JCEO.

When the Burnsides served the Termination Notice, SMC 22.206.160.C.f. provided as follows:

22.206.160 - Duties of owners

**C. Just Cause Eviction.**

1. Pursuant to provisions of the state Residential Landlord-Tenant Act (RCW 59.18.290), owners may not evict residential tenants without a court order, which can be issued by a court only after the tenant has an opportunity in a show cause hearing to contest the eviction (RCW 59.18.380). In

addition, owners of housing units shall not evict or attempt to evict any tenant, or otherwise terminate or attempt to terminate the tenancy of any tenant unless the owner can prove in court that just cause exists. The reasons for termination of tenancy listed below, and no others, shall constitute just cause under this section 22.206.160:

\* \* \*

f. The owner elects to sell a single-family dwelling unit and gives the tenant at least 60 days written notice prior to the date set for vacating, which date shall coincide with the end of the term of a rental agreement, or if the agreement is month to month, with the last day of a monthly period. For the purposes of this section 22.206.160, an owner "elects to sell" when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated, including, at a minimum, listing it for sale at a reasonable price with a realty agency or advertising it for sale at a reasonable price in a newspaper of general circulation. There shall be a rebuttable presumption that the owner did not intend to sell the unit if:

- 1) Within 30 days after the tenant has vacated, the owner does not list the single-family dwelling unit for sale at a reasonable price with a realty agency or advertise it for sale at a reasonable price in a newspaper of general circulation, or
- 2) Within 90 days after the date the tenant vacated or the date the property was listed for sale, whichever is later, the owner withdraws the rental unit from the market, rents the unit to someone other than the former tenant, or otherwise indicates that the owner does not intend to sell the unit;

On September 9, 2015, the City enacted Ordinance No. 124862

that amended the JCEO as follows<sup>2</sup>:

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<sup>2</sup> The language of the ordinance that was removed is crossed out and the new language is underlined.

f. The owner elects to sell a single-family dwelling unit and gives the tenant at least ~~((60))~~90 days' written notice prior to the date set for vacating, which date shall coincide with the end of the term of a rental agreement, or if the agreement is month to month, with the last day of a monthly period. The Director may reduce the time required to give notice to no less than 60 days if the Director determines that providing 90 days' notice will result in a personal hardship to the owner. Personal hardship may include but is not limited to hardship caused by illness or accident, unemployment, or job relocation. For the purposes of this ~~((s))~~Section 22.206.160, an owner "elects to sell" when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated, including, at a minimum, listing it for sale at a reasonable price with a realty agency or advertising it for sale at a reasonable price in a newspaper of general circulation. There shall be a rebuttable presumption that the owner did not intend to sell the unit if:

1) Within 30 days after the tenant has vacated, the owner does not list the single-family dwelling unit for sale at a reasonable price with a realty agency or advertise it for sale at a reasonable price in a newspaper of general circulation, or

2) Within 90 days after the date the tenant vacated or the date the property was listed for sale, whichever is later, the owner withdraws the rental unit from the market, rents the unit to someone other than the former tenant, or otherwise indicates that the owner does not intend to sell the unit;

The only substantive change to the JCEO was that the owner is now required to give 90 days' notice, as opposed to the 60 days' notice that was previously required. In addition, the Director was given authority to reduce the notice period if the owner would suffer a personal hardship by providing the full 90 days' notice. This recent amendment does not change the fact that the Termination Notice complied with the terms of the JCEO that were in effect when the notice was served.

C. **The City's inconsistent, and continually changing, interpretation of the JCEO.**

Mr. Prudhon relies on the City's erroneous interpretation of what it means when an owner "elects to sell" a single family home under the JCEO. In a few short months, the City repeatedly, and without providing any coherent explanation, changed its position on what it means when an owner "elects to sell" a single family home. The City's multiple interpretations of the JCEO is summarized as follows.

On April 9, 2015, Ryan Weatherstone, a City employee with the Department of Preservation and Development<sup>3</sup> ("DPD"), emailed Kristen Meyer, the Burnsidess' real estate agent. CP 118-120. In that email, Mr. Weatherstone alleged that the Termination Notice was not valid because the Burnsidess did not wait until after Mr. Prudhon vacated the Premises to

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<sup>3</sup> DPD is now known as Seattle Department of Construction and Inspections (SDCI).

enter into a purchase and sale agreement. Specifically, Mr. Weatherstone stated that “[b]y entering into a purchase and sale agreement prior to the tenant vacating the property (in fact it was entered into prior to the issuance of the notice) the owner fails to meet the definition of ‘elects to sell’ as defined by the ordinance.” CP 119. In that same email, Mr. Weatherstone acknowledged that “[DPD] had previously allowed a seller to enter into a purchase and sale agreement after a notice of termination was given,” tacitly admitting that the Termination Notice would have been valid under DPD’s prior interpretation of the JCEO. CP 119. Mr. Weatherstone requested that the Burnsidés rescind the Termination Notice by the end of the day. CP 120. The Burnsidés declined to rescind the notice.

That same day, Samuel Jacobs, a partner with Helsell Fetterman LLP, the attorneys for Thoreson Homes, sent Faith Lumsden, the Director of Code Compliance at DPD, a letter challenging Mr. Weatherstone’s interpretation of the JCEO. CP 122-124. In response to that letter, Ms. Lumsden left Mr. Jacobs a voicemail acknowledging that Mr. Weatherstone’s interpretation of the JCEO was not correct, but that DPD would still be issuing a notice of violation upon a different interpretation of the JCEO. On April 16, 2015, DPD served the Burnsidés with a notice of violation (“NOV”), for purportedly violating the JCEO. CP 126-128.

The NOV confirmed that DPD was no longer interpreting the JCEO to mean that the owner must wait until the tenant vacates before entering into a purchase and sale agreement, but rather that the owner only needed to serve the termination notice prior to entering into the purchase and sale agreement.

Specifically, the NOV stated, in relevant part, that:

#### **VIOLATION**

**Because the owner of the above described property had already entered into a purchase and sale agreement at the time the “[60] Day Notice to Terminate Tenancy” was issued, the owner failed to meet the ordinance’s definition of “elects to sell.”** The notice thus violates Seattle Municipal Code Section 22.206.160(C)(1)(f). (emphasis added)

On April 27, 2015, in response to the NOV, and under SMC 22.206.230(A), Thoreson Homes requested a review of the NOV by a Department Review Officer. CP 130-135. The request for review pointed out DPD’s constantly changing interpretation of the JCEO, and that each of those interpretations were inconsistent with the plain and unambiguous language of the JCEO.

On May 15, 2015, DPD issued an Order of the Director Following Reconsideration of Housing Code Notice of Violation Just Cause Eviction Ordinance (“Director’s Order”), which sustained the NOV. CP 137-141. The Director’s Order did not sustain the NOV based upon the same

interpretation of the JCEO that was adopted in the NOV. The Director's Order stated that it was a violation of the JCEO if the owner enters into a purchase and sale agreement at any time before the tenant vacates. There is no language found in the JCEO that prohibits an owner from either (a) entering into a purchase and sale agreement prior to serving a termination notice or (b) selling the property prior to the tenant vacating. The owner must simply commence selling activities, which includes selling the home, within thirty days after the tenant has vacated.

**D. Procedural History.**

The Termination Notice terminated Mr. Prudhon's tenancy and required him to vacate the Premises by June 30, 2015. Mr. Prudhon failed to vacate the Premises after his tenancy was terminated. On or about, July 24, 2015, Mr. Prudhon was served with the Eviction Summons and Complaint for Unlawful Detainer. CP 1-19. On July 30, 2015, Mr. Prudhon was served with an Order to Show Cause why a writ of restitution should not be issued restoring Thoreson Homes to possession of the Premises. CP 25-26.

On August 11, 2015, Mr. Prudhon filed and served Defendant's Answer, Affirmative Defenses and Motion to Dismiss. CP 31-49. On August 14, 2015, Commissioner Judson entered an Ex Parte Department Certification for Trial. CP 50-51. Trial was initially scheduled for

September 14, 2015 and was continued by stipulation of the parties to October 8, 2015. CP 52-54.

Because this dispute concerned a purely legal issue, the parties stipulated that the trial would be treated as a motion for summary judgment. Each party submitted trial briefs and signed and filed the JSE with the trial court. CP 98-180. The JSE stated in relevant part, as follows:

**The parties are in agreement that there are no factual disputes and that this unlawful detainer action concerns a purely legal issue. Namely, whether the notice of termination served by plaintiff's predecessor-in-interest complied with the Just Cause Eviction Ordinance – Seattle Municipal Code (“SMC”) 22.206.160.C.f (the “JCEO”).** Accordingly, the parties will not be calling any witnesses and will be relying on the agreed facts stated below and the exhibits attached hereto. (emphasis added)

On October 8, 2015, the Honorable Monica Benton heard oral argument from the parties. After argument, Judge Benton requested additional briefing on the narrow issue of whether Thoreson Homes was required to appeal the Director's Order to the Hearing Examiner, and thus, failed to exhaust its administrative remedies. CP 57-86 (Mr. Prudhon's post-trial brief); CP 87-97 (Thoreson Homes's post-trial brief).

On December 3, 2015, Judge Benton ruled in favor of Thoreson Homes and signed an Order Granting the Relief Sought in [Thoreson Homes'] Complaint for Unlawful Detainer. CP 230-232. On December 9,

2015, Mr. Prudhon filed a Motion and Declaration to Reconsider Judgment and to Stay Enforcement of Judgment and Writ of Restitution. CP 233-242. On December 14, 2015, Thoreson Homes filed a Motion to Enter Judgment Against [Mr. Prudhon] for Costs and Attorneys' Fees. CP 250-270. On December 21, 2015, Judge Benton entered judgment in favor of Thoreson Homes and Against Mr. Prudhon in the amount of \$17,725.46. CP 285-286. On December 23, 2015, the King County Sheriff returned possession of the premises to Thoreson Homes. CP 289-297. On January 4, 2016, Judge Benton entered an Order Denying [Mr. Prudhon's] Motion to Reconsider Judgment and to Stay Enforcement of Judgment and Writ of Restitution. CP 287-288. Mr. Prudhon now appeals Judge Benton's December 3, 2015 order. CP 271-274.

#### IV. ARGUMENT

A. **The standard of review is de novo, and the record supports the trial court's ruling that the Termination Notice complied with the JCEO.**

This Court reviews de novo a trial court's order granting summary judgment. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006). Evidence is viewed in the light most favorable to the nonmoving party. *Id.*

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. CR 56(c). A genuine issue is one upon which reasonable people may disagree. *Youker v. Douglas Cnty.*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). In addition, factual disputes must be material to survive summary judgment, and a “material fact” is one on which the outcome of the litigation depends. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009); *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

If the moving party shows the absence of a genuine issue of material fact, then the burden shifts to the nonmoving party to set forth specific facts that would raise a genuine issue of material fact for trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *see* CR 56(c). If the nonmoving party fails to show an issue of material fact as to any element of a claim, then summary judgment is appropriate. *Young*, 112 Wn.2d at 225. “The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

In this matter, the parties are in agreement that there are no factual disputes, much less a dispute of a material fact that would preclude summary judgment. The parties stipulated in the JSE that “there are no factual disputes and [] this unlawful detainer action concerns a purely

legal issue.” CP 98. In light of this stipulation, the evidence should not be viewed in favor of one party over the other. The record on review here clearly supports the trial court’s order granting Thoreson Homes the entire relief sought in its complaint for unlawful detainer.

**B. Interpretation of a city ordinance.**

Courts interpret local ordinances the same as statutes. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 69 P.3d 318 (2008). Statutory construction begins by reading the text of the statute. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). If the language is unambiguous, the inquiry ends with the plain language and we assume the statute means exactly what it says. If the statutory provision is potentially ambiguous, which the JCEO clearly is not, the wording of that provision must be used to determine its meaning.

Statutes or ordinances must be construed so as to effect the intent of the legislative body that adopted the ordinance or statute. *Muckleshoot Indian Tribe v. Dept. of Ecology*, 112 Wn. App. 712, 727-728, 50 P.3d 668 (2002). Where an ordinance is subject to interpretation, “every provision must be read in relation to every other provision so as to harmonize the ordinance’s construction.”

A statute should not be interpreted so as to render any portion of it superfluous. *Jones v. King County*, 74 Wn. App. 467, 475-476, 874 P.2d

853 (1994). A legislative body is presumed not to use nonessential words. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). Therefore, each word of the statute must be accorded meaning and interpreted so that no portion of the statute is rendered meaningless or superfluous. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

A statute is ambiguous if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.” *Agrilink Foods, Inc. v. Dept. of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). Because “the language of a statute is plain, that ends the court's role.” *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 240, 208 P.3d 5 (2009); citing *Cerrillo v. Esparza*, 158 Wn.2d 194, 205–06, 142 P.3d 155 (2006).

“Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297, 300-01 (2009); citing *Agrilink Foods, Inc. v. Dept. of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). A statute that is clear on its face is not subject to judicial construction. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

The JCEO is not ambiguous, nor is it susceptible to multiple interpretations. In other words, the ordinance means exactly what it says. An owner of a single family home has just cause to evict a tenant when it “gives the tenant at least 60 days written notice prior to the date set for vacating” and “makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated.” There is no requirement that the owner must wait until the tenant has vacated, or has been evicted, prior to making reasonable attempts to sell the dwelling.

C. **The Termination Notice complied with the Just Cause Eviction Ordinance.**

The sole issue before this Court is whether the Termination Notice complied with the JCEO. The JCEO requires an owner to do two things before it may terminate a tenant’s monthly tenancy: (a) elect to sell a single family dwelling unit; and (b) give the tenant at least 60 days’ written notice prior to the date set for vacating, which date shall coincide with the end of the term of a rental agreement, or if the agreement is month to month, with the last day of a monthly period. Mr. Prudhon admits that he was given at least 60 days written notice (in fact it was almost 90) prior to the termination of his tenancy. Accordingly, the only issue before this Court is whether the Burnsides “elected to sell” the Premises.

The JCEO defines “elects to sell” as follows:

For the purposes of this section 22.206.160, **an owner "elects to sell" when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated, including, at a minimum, listing it for sale at a reasonable price with a realty agency or advertising it for sale at a reasonable price in a newspaper of general circulation.** There shall be a rebuttable presumption that the owner did not intend to sell the unit if: (emphasis added)

1) Within 30 days after the tenant has vacated, the owner does not list the single-family dwelling unit for sale at a reasonable price with a realty agency or advertise it for sale at a reasonable price in a newspaper of general circulation, or

2) Within 90 days after the date the tenant vacated or the date the property was listed for sale, whichever is later, the owner withdraws the rental unit from the market, rents the unit to someone other than the former tenant, or otherwise indicates that the owner does not intend to sell the unit;

The JCEO provides an end date for the owner to make reasonable attempts to sell the dwelling unit – 30 days after the tenant has vacated – but it does not provide a beginning date. More importantly, the JCEO does not require that the attempts to sell be made either before or after service of the 60 day termination notice.

It is illogical to conclude that the Burnsides did not meet the definition of “elects to sell” because the Termination Notice was served a day or two after execution of the purchase and sale agreement. This

interpretation contradicts the plain language of the JCEO and the rules of statutory construction.

It is even more illogical to conclude that the Burnsides should have waited for Mr. Prudhon to vacate the Premises before making any attempts to sell the property. Subsection 2 of the JCEO states in relevant part that “[w]ithin 90 days after the date the tenant vacated or the date the property was listed for sale, whichever is later, the owner withdraws the rental unit from the market...” This ordinance establishes two bench marks for measuring the 90 day deadline: (a) the date the tenant vacated; or (b) the date that the property was listed for sale. If the argument is made that the owner cannot make any attempts to sale the property until the tenant has vacated, then the provision would be meaningless because 90 days after the property was listed for sale would always be later than 90 days after the tenant has vacated. When read together, and not in isolation, this subsection makes it clear that an owner may commence selling activities before the tenant has vacated or been evicted.

There is no reasonable reading of the JCEO that could lead to the conclusion that entering into a purchase and sale agreement would not meet the statutory definition of “elects to sell,” regardless of whether it was executed before or after the tenant was served with the termination notice. Specifically, the ordinance states that “...an owner ‘elects to sell’

when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated, including, at a minimum, listing it for sale at a reasonable price with a realty agency or advertising it for sale at a reasonable price in a newspaper of general circulation.” This is the minimum that an owner must do to satisfy the “elects to sell” requirement. This begs the question: What is the maximum that an owner may do to satisfy the “elects to sell” requirement? Sell the property. Since it is undisputed that the Premises was sold by the Burnside to Thoreson Homes, the “elects to sell” requirement was clearly satisfied and the Termination Notice complied with the JCEO.

The City’s multiple interpretations of the ordinance is not persuasive, much less binding on this Court. In *Brown v. City of Seattle*, 117 Wn. App. 781, 790-91, 72 P.3d 764, 768-69 (2003), this Court declined to give deference to the City’s interpretation of its own ordinance, holding as follows:

The City urges this court to defer to its interpretation of the code because it argues judicial deference should be given to the construction of an ordinance by the agency charged with its enforcement. But this rule of statutory construction applies only when the law being interpreted is ambiguous, and even then, the agency's interpretation is not “absolutely controlling” on the court. This court does not defer to an interpretation which conflicts with the language of the law. It is ultimately for the court to determine the purpose and meaning of the law. The City's interpretation is not entitled

to deference here because the specific language of SMC 23.60.018 is not ambiguous. (internal citations omitted).

The City's interpretation of the JCEO is inconsistent, and contradicts the unambiguous language of the ordinance. Accordingly, none of the City's multiple interpretations should be given any deference.

**D. Mr. Prudhon is precluded from raising additional arguments that were not raised before the trial court.**

Mr. Prudhon raises several new issues in his appellate brief that fall outside the scope of the single, stipulated issue that was before the trial court. It is well settled that, except in extremely limited circumstances, none of which apply here, issues may not be raised for the first time on appeal.

The Court of Appeals will not review an issue, theory, argument, or claim of error not presented at the trial court level. *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1, 5 (2001); RAP 2.5(a). RAP 2.5(a) provides as follows:

(a) Errors Raised for First Time on Review. **The appellate court may refuse to review any claim of error which was not raised in the trial court.** However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly

consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court. (emphasis added)

None of the narrow exceptions identified in RAP 2.5(a) are applicable to this matter.

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212, 214 (1984); quoting *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). This rule affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal. *Id.*; *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 482, 256 P.2d 301 (1953).

As the Supreme Court stated in *Ruddach v. Don Johnston Ford, Inc.*, 97 Wn.2d 277, 281, 644 P.2d 671, 673 (1982), a landlord-tenant action, “[i]ssues not raised in the trial court will not be considered for the first time on appeal. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980); *Barnes v. Seattle School Dist. 1*, 88 Wn.2d 483, 563 P.2d 199 (1977); *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977). “Nor will [the Supreme Court] review a case on a theory different from that in which it was presented at the trial level.” *Matthias v. Lehn & Fink*

*Products Corp.*, 70 Wn.2d 541, 543, 424 P.2d 284, 285 (1967); *State v. Reano*, 67 Wn.2d 768, 409 P.2d 853 (1966).

There are additional restrictions on what issues may be raised on appeal of an order for summary judgment. RAP 9.12 – Special Rule for Order on Summary Judgment – provides as follows:

On review of an order granting or denying a motion for summary judgment **the appellate court will consider only evidence and issues called to the attention of the trial court.** The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel. (emphasis added)

RAP 9.12 eliminates any minor discretion that the Court of Appeals is afforded under RAP 2.5(a).

The Court of Appeals will “consider only evidence and issues called to the attention of the trial court.” *Food Servs. of Am. v. Royal Heights, Inc.*, 69 Wn. App. 784, 791, 850 P.2d 585, 589 (1993), *aff’d*, 123 Wn.2d 779, 871 P.2d 590 (1994); RAP 9.12; *Alexander v. Gonser*, 42 Wn. App. 234, 237, 711 P.2d 347 (1985), *review denied*, 105 Wn.2d 1017 (1986). A party has the obligation to assert its claims, legal positions, and arguments to the trial court to preserve the alleged error on appeal. Issues not raised in the hearing for summary judgment cannot be considered for

the first time on appeal. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 860, 565 P.2d 1224, 1229 (1977); *State v. Burri*, 87 Wn.2d 175, 178, 550 P.2d 507 (1976); *State v. Young*, 87 Wn.2d 129, 132, 550 P.2d 1 (1976); *Ferrin v. Donnellfeld*, 74 Wn.2d 283, 444 P.2d 701 (1968); *Save-Way Drug, Inc. v. Standard Investment Co.*, 5 Wn. App. 726, 490 P.2d 1342 (1971).

In this matter, not only did Mr. Prudhon fail to raise these additional issues before the trial court, but he explicitly stipulated in the JSE that the sole issue to be decided by the trial court was whether the Termination Notice complied with the JCEO.

The Supreme Court has ruled that parties are bound by stipulations entered into in the trial court. *See e.g., Spencer v. Alki Point Transp. Co.*, 53 Wn. 77, 101 P. 509 (1909) (holding that where the parties stipulated, “for the purpose of this judgment,” that defendant was indebted to plaintiff in a certain sum, one of the parties cannot have the amount of the indebtedness reviewed on the ground that the stipulation was only intended to be effective in the trial court); *Yakima Water, Light & Power Co. v. Hathaway*, 18 Wn. 377, 380, 51 P. 471, 472 (1897) (holding that a statement of facts made by all parties interested, in the superior court, with a stipulation waiving formal pleadings, constitutes a record upon which the court, on appeal, will consider the cause).

Based upon the prevailing case law, RAP 2.5(a), and RAP 9.12 this Court should decline to review Mr. Prudhon's newly raised arguments. However, in the event this Court is inclined to consider Mr. Prudhon's additional arguments, this Court should still affirm the trial court's order for the reasons set forth below.

1. The Seattle Municipal Court does not have exclusive jurisdiction over the JCEO.

Mr. Prudhon argues that SMC 3.33.020 stands for the proposition that the "Seattle Municipal Code is the court with jurisdiction to decide matters arising out of the 'Just Cause Eviction Ordinance.'" Mr. Prudhon's Opening Brief, p. 15, ¶1. However, this is not an accurate statement of the law.

SMC 3.33.020 – Jurisdiction—Authority – provides in relevant part, as follows:

**The Municipal Court has jurisdiction to try violations of all City ordinances** and all other actions brought to enforce or recover license penalties or forfeitures declared or given by any such ordinances. It is empowered to forfeit cash bail or bail bonds and issue execution thereon, to hear and determine all causes, civil or criminal, arising under such ordinances, and to pronounce judgment in accordance therewith; (emphasis added)

Likewise, Mr. Prudhon cites RCW 35.20.030 for the same proposition.

RCW 35.20.030 provides in part, that:

Jurisdiction—Maximum penalties for criminal violations—  
Review—Costs.

**The municipal court shall have jurisdiction to try violations of all city ordinances** and all other actions brought to enforce or recover license penalties or forfeitures declared or given by any such ordinances. It is empowered to forfeit cash bail or bail bonds and issue execution thereon, to hear and determine all causes, civil or criminal, arising under such ordinances, and to pronounce judgment in accordance therewith: (emphasis added)

The ordinance and statute cited by Mr. Prudhon provide that the Seattle Municipal Court has jurisdiction over the City's enforcement of civil penalties resulting from the issuance of a notice of violation or director's order. This appeal concerns an unlawful detainer action and is not in any way related to the City's enforcement of a violation of an ordinance. More importantly, these provisions do not preclude the Superior Court from deciding whether the Termination Notice was valid in the context of an unlawful detainer proceeding.

There is an abundance of case law where the Superior Court has ruled on the validity of a termination notice served under the Just Cause Eviction Ordinance. *See e.g., Faciszewski v. Brown*, 192 Wn. App. 441 (2016) (holding that termination noticed served by landlord complied with just cause eviction ordinance). Mr. Prudhon fails to cite to any legal authority that would divest the Superior Court of jurisdiction to decide whether the Termination Notice complied with the JCEO.

2. There is no right to appeal a notice of violation or director's order to the Seattle Municipal Court.

Mr. Prudhon argues, for the first time that, Thoreson Homes should have appealed the Director's Order to the Seattle Municipal Court. During oral argument before Judge Benton, Mr. Prudhon argued that Thoreson Homes should have appealed the Director's Order to the Hearing Examiner. After submitting post-trial briefs, Judge Benton did not find that Thoreson Homes should have appealed the Director's Order to the Hearing Examiner and failed to exhaust its administrative remedies.

The JCEO does not provide any right to appeal the Director's Order to the Hearing Examiner, as Mr. Prudhon argued at the summary judgment hearing, nor does it provide any right of appeal to the Seattle Municipal Court, as Mr. Prudhon now argues for the first time. Furthermore, there is no legal authority under the JCEO, SMC 3.33.020 or RCW 35.20.030 to appeal a Director's Order or Notice of Violation to the Hearing Examiner or to the Seattle Municipal Court.

As previously stated, SMC 3.33.020 and RCW 35.20.030 refer to the City's enforcement of civil penalties. They do not concern unlawful detainer actions or the Superior Court's jurisdiction to determine the validity of a termination notice served under the JCEO.

**E. Thoreson Homes concurs with Mr. Prudhon that this matter is not moot.**

Thoreson Homes is in agreement with Mr. Prudhon that this matter is not moot, and he has standing to appeal, despite the fact that he is no longer in possession of the Premises.

**F. Thoreson Homes is entitled to its costs and reasonable attorneys' fees incurred in defending this appeal.**

On December 3, 2015, the trial court entered an Order Granting the Relief Sought in [Thoreson Homes's] Complaint for Unlawful Detainer (the "Order"). CP 230-232. The Order awarded Thoreson Homes its "costs, disbursements and reasonable attorneys' fees in an amount to be determined by the Court based upon Thoreson Homes' counsel's declaration and billing statements." On December 21, 2015, Judge Benton entered judgment against Mr. Prudhon for costs and attorneys' fees incurred by Thoreson Homes in the amount of \$17,725.46. CP 285-286.

In Washington State, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406, 410-11 (2001); *quoting Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). If such fees are allowable at trial, the prevailing party may recover fees on appeal as well. RAP 18.1; *see also Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 576, 928 P.2d 1149 (1997).

Under RAP 18.1, Thoreson Homes requests its attorneys' fees, costs and expenses incurred in this appeal. Thoreson Homes is entitled to these amounts under RCW 59.18.410, RAP 18.1 and the Lease.

RCW 59.18.410 provides in relevant part, as follows:

Forcible entry or detainer or unlawful detainer actions—  
Writ of restitution—Judgment—Execution.

The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages arising out of the tenancy occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and **the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer** for the amount of damages thus assessed and for the rent, if any, found due, **and the court may award statutory costs and reasonable attorney's fees.** (emphasis added)

Likewise, paragraph 14 of the Lease (CP 7, ¶14) provides as follows:

**ATTORNEYS' FEES:** As provided by law and except as otherwise prohibited, **the prevailing party shall be entitled to recover its reasonable attorneys fees and court costs incurred in the event any action, suit or proceeding commenced to enforce the terms of this Agreement.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. It is agreed that venue for any legal action brought to enforce the terms of this Agreement shall be in the District or Superior Court with jurisdiction over the area in which the premises are located. (emphasis added)

Upon affirming the trial court's order, this Court should award Thoreson Homes its costs, expenses and reasonable attorneys' fees incurred in this appeal.

**V. CONCLUSION**

The Termination Notice complied with the JCEO, and the trial court properly granted Thoreson Homes the relief sought in its complaint for unlawful detainer, including possession of the Premises and its costs and attorneys' fees. This Court should affirm the trial court's order and award Thoreson Homes its costs and reasonable attorneys' fees incurred in this appeal.

Respectfully submitted this 7<sup>th</sup> day of July, 2016.

HELSELL FETTERMAN LLP

By /s/ Brandon S. Gribben

Brandon S. Gribben, WSBA No. 47638  
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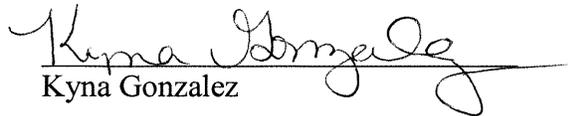
**CERTIFICATE OF SERVICE**

I, Kyna Gonzalez, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.
2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.
3. In the appellate matter of Prudhon v. R. Thoreson Homes, LLC I did on the date listed below, (1) cause to be filed with this Court the Respondent's Brief; and (2) to be delivered via E-mail to Elizabeth Powell, 535 Dock Street, Suite 108, Tacoma, WA 98402, who are counsel of record of Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: July 7, 2016

  
Kyna Gonzalez