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No. 92978-5

SUPREME COURT
FOR THE STATE OF WASHINGTON

STEPHEN FACISZEWSKI and VIRGINIA KLAMON,

Respondents,

v.

MICHAEL R. BROWN and JILL A. WAHLEITHNER,

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS – FACISZEWSKI AND

KLAMON

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II. INTRODUCTION

The purpose of a jury trial is to resolve disputes of material fact. Courts do not engage in speculative litigation about what may or may not happen. In Seattle, the Just Cause Eviction Ordinance (the Ordinance) requires that a landlord have one of 16 “just causes” to terminate a residential tenancy. SMC 22.206.160(C)(1).¹ One just cause is that the landlord seeks to use the property as his, her, or an immediate family member’s principal residence. SMC 22.206.160(C)(1)(e). The unique nature of this ordinance is that the “material fact” at issue cannot be determined until the property is vacant. The tenants ask the court to order a jury trial to allow them to disprove the landlord’s intent to move in while the tenants continue to live there.

Seattle recognized that the landlord cannot carry out his or her intent to move in until after the tenant vacates. To preserve the expedited nature of unlawful detainers, the Ordinance provides that the landlord may prove just cause by signing a sworn certification of his or her intent. SMC 22.206.160(C)(4). After the tenant vacates, if the landlord does not follow through on this intent, the tenant may sue for damages. SMC

¹ The Ordinance has been amended three times since reconsideration of the final order was denied on September 23, 2014. CP at 342-44; *see* Ord. 124919, § 78 (Sea. 2015); Ord. 124862, § 1 (Sea. 2015); Ord. 124738, § 1 (Sea. 2015). All citations are to the 2014 version of the Ordinance. A copy of the 2014 version of the Ordinance is also included as an appendix to this brief. All further citations will refer to the 2014 version of the ordinance unless otherwise noted.

22.206.160(C)(7). Consistent with the Unlawful Detainer Act (UDA), this statutory scheme balances the interests of landlord and tenant. It maintains the landlord's ability to quickly resolve the issue of possession through an unlawful detainer. It also allows the tenant both a pre-eviction and a post-eviction remedy if he or she believes the landlord breached the Ordinance.

The tenants in this case offered evidence that they did not believe the landlord would carry out his just cause notwithstanding his sworn certification. They ask this court to adopt a rule that their pre-eviction suspicion creates a material dispute of fact that requires a trial on what may happen post-eviction.

This court should maintain the balance set out in the Ordinance. If the landlord certifies his or her intent to move into the property, he should prevail at the show cause hearing. If the landlord does not carry out this intent, the landlord should be liable for the civil penalties and damages provided for under the Ordinance. The court should not require a trial on speculation about the future.

III. STATEMENT OF THE CASE

Stephen Faciszewski and Virginia Klamon (collectively "Faciszewski and Klamon") rented their house in Seattle's Magnolia neighborhood (the Premises) to Michael Brown and Jill Wahleithner

(collectively “Brown and Wahleithner”) on a month-to-month basis. CP at 1, 14. On June 29, 2014, Faciszewski served Brown and Wahleithner with a notice of termination of tenancy, stating that Faciszewski and Klamon were terminating the tenancy “so that at least one immediate family member (or, in the alternative, one of us) may occupy the Property as a principal residence.” CP at 172. The notice provided Brown and Wahleithner with 32 days to vacate the Premises. *Id.*

In response to the notice, Brown “began researching Mr. Faciszewski’s parents on the internet.” CP at 46. Brown and Wahleithner also exercised their right to request that Faciszewski and Klamon certify their intent that a family member would move into the Premises after Brown and Wahleithner vacated. CP at 46-47, 77; *see* SMC 22.206.160(C)(4). It is undisputed that Faciszewski and Klamon satisfied the certification requirements of the Ordinance. CP at 46-47, ¶ 8; CP at 77. In his sworn declaration, Faciszewski stated that “Stephen or/and Margaret Faciszewski,” his mother, would move in after Brown and Wahleithner vacated.² CP at 77.

Despite the certification, Brown and Wahleithner failed to vacate the Premises. CP at 15. Following their failure to vacate, Brown and

² The Landlord’s original intent was that both of Mr. Faciszewski’s parents would move into the Premises. CP at 46. After service of the notice, Mr. Faciszewski’s father passed away. *Id.*

Wahleithner asserted that they were “suspicious” of Faciszewski and Klamon’s stated reason for terminating their tenancy and asserted no just cause existed for the termination. CP at 17, ¶ 3.9; *see* CP at 15-18. To demonstrate their suspicion, they filed declarations discussing a prior, unrelated disagreement with another neighbor over parking. Additionally, they presented evidence that they had been monitoring Mr. Faciszewski’s mother, Margaret, who lived in Colorado. CP at 46, 80-84.

At the show cause hearing, Brown and Wahleithner alleged Faciszewski and Klamon’s stated intent was a pretext and that they believed Mr. Faciszewski was lying.³ CP at 160-61. On revision,⁴ the Superior Court ruled that there was no substantial material dispute of fact that Faciszewski and Klamon had just cause. CP at 243-45. Brown and Wahleithner’s evidence did not speak to Faciszewski and Klamon’s intent, only to Brown and Wahleithner’s belief about their intent. Faciszewski and Klamon “complied with the City investigation by providing a statement under penalty of perjury that a relative would

³ The Tenants alleges various other defenses, including retaliation, insufficiency of service of notice, and defects in the form of the notice that are not under review by this court. *E.g.* CP at 160-62; RP, Aug. 12, 2014, at 4.

⁴ Faciszewski and Klamon successfully obtained revision of the pro tem court commissioner who presided at the show cause hearing. CP at 32-39; *see* RCW 2.24.050. On appeal, the court commissioner’s order is not relevant to review. *In re Marriage of Dodd*, 120 Wn. App. 638, 643, 86 P.3d 801 (2004).

move into the premises.” *Id.* Brown and Wahleithner were evicted and the Court of Appeals affirmed. This appeal followed.

IV. ARGUMENT

A. The court must balance conflicting policy goals of an owner’s right to use his or her own property and a tenant’s interest in protection from unlawful eviction

Modern landlord-tenant laws seek to create a balance between safe, stable living conditions for tenants and property owner’s right to use of their property. Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith As A Limitation on the Landlord’s Right to Terminate*, 19 Ga. L. Rev. 483, 530 (1985). At common law, a landlord may terminate a tenancy for any reason or no reason at all: *Peoples Park & Amusement Ass’n, Inc. v. Androony*, 200 Wash. 51, 56-57, 93 P.3d 362 (1939); *Najewitz v. City of Seattle*, 21 Wn.2d 656, 658, 152 P.2d 722 (1944).

Prior to passage of the UDA, the legal process for removing a tenant was slow and time-consuming. Brian T. McManus, *Retaliatory Evictions in Washington and Seattle: In Search of Public Policy*, 57 Wash. L. Rev. 293, 315 (1982). Landlords who were dissatisfied with this process and needed possession quickly often resorted to self-help evictions and violence. *Id.*

The UDA allows landlords to summarily obtain possession of property using a “speedy, efficient action to evict a tenant for breach or for certain activities on the premises.” *Duvall Highlands v. Elwell*, 104 Wn. App. 763, 768, 19 P.3d 1051 (2001). The court can make summary determination of most facts and immediately restore possession when warranted. RCW 59.18.380. Where a trial is necessary, the court may order one, but there is no absolute right to trial. *Id.*; RCW 59.18.410; *Carlstrom v. Hanline*, 98 Wn. App. 780, 788-90, 990 P.2d 986 (2000); McManus, *Retaliatory Evictions*, 57 Wash. L. Rev. at 315.

Today, most state and local governments recognize a need for balance between an owner’s use right to use their property and a tenant’s interest in freedom from retaliation, particularly in response to complaints about defects in the property. *Id.* The RLTA allows Washington landlords to terminate month-to-month tenancies without cause, but also prohibits retaliatory evictions. RCW 59.18.240; *see* RCW 59.18.200. A month to month tenant has no absolute right to continue his or her tenancy, but the landlord’s power of termination is at least partly limited. *Id.*

Various state and local governments have adopted three general categories of laws to balance these interests. Bell, *Providing Security of Tenure*, 19 Ga. L. Rev. at 507. First, the least restrictive for landlords, is to prohibit retaliatory eviction. *Id.* Second, a more protective option for

tenants is to require the landlord to act in good faith with respect to a lease. *Id.*; e.g. RCW 59.18.020. Third, and most onerous for landlords, thus most protective for tenants, is a just cause eviction standard. Bell, *Providing Security of Tenure*, 19 Ga. L. Rev. at 537. Just cause evictions provide tenants with security that their month to month tenancy can only be terminated for certain, enumerated reasons. *Id.*; see e.g. SMC 22.206.160(C)(1).

This court's duty is to balance the competing legislative policies of maintaining quick, efficient evictions that protect a landlord's property rights while also protecting a tenant's due process rights. See e.g. *Leda v. Whisnand*, 150 Wn. App. 69, 79-83, 207 P.3d 468 (2009); *Carlstrom*, 98 Wn. App. at 788-90. It is more difficult to balance these interests where, as here, the landlord cannot complete his or her just cause basis for termination until after the tenant vacates.

B. The Ordinance balances the interest of landlord and tenant by allowing a landlord to certify that he or she will carry out their intent to move into the premises at the show cause hearing to gain possession

Seattle chose to enact just cause eviction protections. The court applies the same rules to interpreting ordinances that it applies to interpreting statutes. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151

P.3d 990 (2006). The purpose of the statute is expressed by reading the act as a whole. *Vashon Island Comm. for Self-Gov't v. Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). When interpreting a statute, the court looks to its plain meaning. *Jakowski v. Borchelt*, 174 Wn.2d 720, 732, 278 P.3d 1100 (2012). The act is the legislature's expression of its intent. *State v. Grays Harbor County*, 98 Wn.2d 606, 608, 656 P.2d 1084 (1983).

The Ordinance restricts when a landlord of residential property may terminate a month-to-month tenant by requiring that the landlord have one of 16 just causes for termination. SMC 22.206.160(C)(1). One of those causes is that “the owner⁵ seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence.” SMC 22.206.160(C)(1)(e).

Lack of just cause is an affirmative defense that the tenant may raise at the show cause hearing. SMC 22.206.160(C)(5); *see* RCW 59.18.380 (tenant may raise affirmative defenses at the show cause hearing. As an affirmative defense, the tenant bears the burden of proof. *Haslund v. Seattle*, 86 Wn.2d 607, 621, 547 P.2d 1221 (1976).

⁵ The Ordinance refers to the “owner” of a dwelling, but the definition is synonymous with that of “landlord” in the RLTA for all purposes relevant to this appeal. RCW 59.18.030(9); SMC 22.204.160(D).

If the tenant doubts the landlord has just cause, the Ordinance provides them with two remedies. After receiving a notice that the landlord is terminating the tenancy for personal or family use, the Ordinance allows a tenant to make a complaint to the city. SMC 22.206.160 (C)(4). The city will then send notice of the complaint to the landlord and require the landlord to certify that he or she will carry out the stated reason for termination after the tenant vacates. *Id.* If the landlord fails to so certify within 10 days, the landlord's failure "shall be a defense for the tenant in an unlawful detainer action based on that ground." See SMC 22.206.160(C)(4).

Second, or as an alternative, after the tenant vacates, the tenant may sue the landlord for damages if the landlord does not carry out the stated reason for termination. SMC 22.206.160 (C)(7).

Brown and Wahleithner ask the court to create a third remedy, allowing them to dispute the veracity of the landlord's certification while remaining in possession of the property; they ask the court to send the parties to a trial where the material dispute is what might happen after the trial concludes. A trial on this issue would consist purely of speculative evidence about what may or may not happen. Until a tenant vacates, it is impossible to know what will happen after that tenant vacates.

Courts do not engage in speculative litigation. Even when a court rules on summary judgment, speculation and inference are insufficient to deny relief. *See Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 397, 928 P.2d 1108 (1996). Brown and Wahleithner ask the court to set the matter for a trial that would be based wholly on speculation and inference.

The trial Brown and Wahleithner seek would be nonsensical. Faciszewski would state, again, that he plans to move into the property and to move his mother into the property. Brown and Wahleithner's attorney could cross-examine him on what plans he has made thus far. Klamon may also testify that she believes her husband will carry out that plan. Faciszewski's mother could testify as well, but her testimony would only be useful as corroborating Faciszewski and Klamon's testimony; Faciszewski's mother's intent is not material because she is not the landlord.

Brown and Wahleithner would then testify that they do not believe their landlords or think the just cause is a pretext.⁶ They may offer additional evidence from their efforts to monitor their landlord and his family about the tentative nature of Faciszewski and Klamon's

⁶ Absent evidence the stated cause is not true, the potential existence of a pretext is not sufficient to deny summary judgment. *Molsness*, 84 Wn. App. at 399 (discussing the evidence required to deny summary judgment).

plans.⁷ In closing arguments, Faciszewski and Klamon's attorney would point out that, until a move-out date is set, Faciszewski and Klamon's plans must be tentative and speculative. Finally, the court would have to soothsay what would happen after its verdict.

The Ordinance resolves this issue by allowing the landlord to rely on his or her sworn certification of intent to obtain possession and then allows the tenant remedies if the landlord fails to carry out this intent. Rather than engage in the speculation that Brown and Wahleithner seek, the Ordinance focuses on facts. Once the landlord certifies that he or she intends to use the premises for personal or family reasons, the unlawful detainer court's inquiry ends.⁸ This standard requires the trial court to rule based on objective facts, not speculate on future events.

This standard is also consistent with the design and purpose of the show cause hearing and the UDA generally. The purpose of the Act is to provide an expedited process for determining the right to possession. *Duvall Highlands*, 104 Wn. App. at 768. The certification process set out

⁷ Brown and Wahleithner make references to Faciszewski and Klamon's "constantly evolving" plans. CP at 46. Their plans necessarily changed following Mr. Faciszewski's father's death. *See id.*

⁸ A reasonable exception would be if the tenant provided evidence that it would be impossible for the landlord to carry out the certified just cause. For example, if the landlord certified that his child was going to occupy the property, and the tenant had evidence that the landlord does not have children, the trial court would summarily rule against the landlord at the show cause hearing, and the tenant would keep possession of the property.

in Ordinance follows the same general principal, allowing an effective method to expeditiously determine the right to possession.

In their petition for review, Brown and Wahleithner encourage this court to require proof of a bona fide reason for termination, citing to New Jersey's interpretation of its Anti-Eviction Act, which also contains a just cause standard. N.J. Stat. Ann. § 2A:18-61.1(1)(3); *Durruthy v. Burnert*, 228 N.J. Super. 199, 201-02, 549 A.2d 456 (N.J. Supp. Ct. App. Div. 1988). However, that statute contains none of the administrative or certification provisions of the Ordinance. See N.J. Stat. Ann. § 2A:18-53–§ 2A:18-84. Unlike Seattle, where the tenant is entitled to a show cause hearing and both pre- and post-eviction administrative protections, in New Jersey, the eviction trial is the tenant's only opportunity to present evidence or be heard. See *id.* at § 2A:18-57, -61.

Additionally, *Durruthy* turned on whether residential units in a mixed-use building were covered by New Jersey's residential "anti-eviction" protections. 228 N.J. Super. at 201-03. The court noted in dicta that no evidence of intent was taken prior to appeal. *Id.* at 204. On remand, the court directed the trial court to determine whether a bona fide reason existed to move because the landlord already lived in the building and more than a year had passed since service of the notice. *Id.*

Unlike the absence of evidence in *Durruthy*, the court in this matter was able to rely on Faciszewski's sworn declaration of his intent. In addition, the Ordinance provides far more extensive pre-eviction and post-eviction remedies to a potentially displaced tenant. See SMC 22.206.160(C)(1)(e), .160(C)(6), .160(C)(7).

When the legislature wishes to hold the landlord to a higher level of proof, they say so. For example, New York law only allows a landlord to terminate a tenancy for personal use if he or she can show a "compelling necessity" to recover possession. See *Rosenbluth v. Finkelstein*, 300 N.Y. 402, 404-05, 91 N.E.2d 581 (New York 1950). Under that standard, the court will give extensive judicial scrutiny to the landlord. See *id.*; *Smilow v. Ulrich*, 806 N.Y.S.2d 392 (N.Y. Civ. Ct. 2005). That is not the legislative scheme that Seattle adopted. In Seattle, the landlord's certification is dispositive for the purposes of unlawful detainer.

C. Even if the court were to review the facts further, Brown and Wahleithner have not established a material dispute of fact

On application of the landlord, the court conducts a show cause hearing to determine whether there is a "substantial issue of material fact" that requires trial. RCW 59.18.380. To prevail at this hearing, the landlord must show that there is "no substantial issue of material fact."

RCW 59.18.380. The majority of unlawful detainers are resolved at the show cause hearing. See *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 421, 280 P.3d 506 (2012). In most instances, the UDA “does not contemplate a full-blown trial.” *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 30, 491 P.2d 1058 (1971); see *Carlstrom*, 98 Wn. App. at 788-90.

The trial court may make factual determinations at a show cause hearing. The standard of proof is lower than the summary judgment standard of no material issue of fact but higher than the unlawful detainer trial standard of a preponderance of the evidence. Use of the word “substantial” denotes that the court may resolve close factual questions at a show cause hearing and only major factual conflicts require trial.

There is no major material dispute of fact in this case. The evidence Brown and Wahleithner offered was not material because it does not dispute Faciszewski and Klamon’s certification. The various declarations offer two broad categories of evidence: (1) statements and copies of e-mails about an unrelated dispute and (2) evidence that Faciszewski’s mother lived in Colorado.

None of the e-mails or statements by Brown and Wahleithner in their declarations disputes that Faciszewski intends to use the Premises as his or his mother’s primary residence. The e-mails almost exclusively

discuss a parking dispute that Faciszewski attempted to broker between Brown and Wahleithner and another neighbor. The statements suggest that Brown and Wahleithner did not like Faciszewski and felt animosity toward him. None of the declarations state that Faciszewski did not intend to move into the Premises or move his mother into the Premises.

The other broad category of evidence Brown and Wahleithner offered relates to Faciszewski's mother. Her intent is not material to the statute, only Faciszewski and Klamon's intent is.⁹ See SMC 22.206.160(C)(1)(e).

Lack of just cause is an affirmative defense on which the tenant bears the burden of proof. SMC 22.206.160(C)(4). Faciszewski and Klamon only need to "prove in court that just cause exists" if the Tenant properly raises an issue of fact. *Id.* at .160(C)(1). In this case, Faciszewski and Klamon were able to rest on Faciszewski's certification alone because Brown and Wahleithner did not offer any evidence that disputed this certification.

⁹ Faciszewski's mother's actions would be relevant in a post-eviction lawsuit for damages if neither she nor Faciszewski actually moved into the Premises. See SMC 22.206.160(C)(7). However, the Ordinance never refers to the landlord's immediate family member's intention. Though it is not the case here, it would be lawful for a landlord to terminate a tenant because he or she intended for a family member to move in even if that family member did not share that intention. See *id.* It would be unlawful, subjecting the landlord to fines and a lawsuit for damages, if the family member did not, in fact, move in. *Id.* at .160(C)(4), (7).

Compare the evidence available in this case with what was available in *Housing Authority v. Silva*. In *Silva*, the Housing Authority stated just cause was habitual failure to comply with the material terms of the rental agreement. *Housing Authority v. Silva*, 94 Wn. App. 731, 736, 972 P.2d 952 (1999). At a show cause hearing, Silva asserted that the Housing Authority failed to comply with the Ordinance because it did not serve him with enough 10 day notices to comply or vacate to meet the just cause requirement. *Id.*; see SMC 22.206.160 (C)(1)(d)(a landlord has just cause to terminate when the tenant habitually fails to comply with the agreement causing the landlord to serve three or more 10 day notices to comply or vacate in a 12 month period). The court found that the Housing Authority could not have just cause under those circumstances. *Silva*, 94 Wn. App. at 736.

In *Silva*, the tenant prevailed because it was not possible for the landlord to meet the stated reason for termination; the landlord had not taken the necessary past actions. *Silva*, 94 Wn. App. at 736. Here, even if every piece of evidence offered by Brown and Wahleithner is true, Faciszewski and his mother could still move into the Premises. To create a material issue of fact, Brown and Wahleithner must offer evidence that Faciszewski and Klamon did not comply with the ordinance. Brown and Wahleithner have not provide that evidence.

D. The Ordinance provides two opportunities for the tenant to challenge the landlord's reason for termination without requiring a trial on future intentions

A tenant who does not have evidence that his or her landlord or landlord's family member cannot move into the property is not without meaningful remedies. The statute affords two remedies, each of which may lead to a trial.

After receipt of the notice of termination and before vacating, a tenant may exercise his or her right to request that the City require the landlord's certification of intent within 10 days. SMC 22.206.160(C)(4). Brown and Wahleithner exercised this right and Faciszewski filed the required certification. CP at 46-47, ¶ 8; CP at 77.

In addition, after vacating, if the landlord does not in fact move into the property, the tenant can sue for damages.¹⁰ SMC 22.206.160(C)(7). The Ordinance further protects the tenant by providing for a presumption of a violation when the landlord or immediate family member does not occupy the premises for at least 60 of the 90 days after the tenant vacates. SMC 22.206.160(C)(1)(e).

¹⁰ In addition to this damages claim, Seattle can levy civil penalties on the landlord for violation of the Ordinance. SMC 22.206.160(C)(6). The trial court recognized these remedies in its oral opinion. RP, Sept. 2, 2014, at 22-23.

These statutory remedies demonstrate that the City Council's intent when it enacted the Ordinance was for litigation to focus on a landlord's objective acts, not his or her future intentions. This statutory scheme is consistent throughout the Ordinance. Though there are 16 just causes, only three use the complaint and certification scheme set out in subpart (4), and each of those just causes involve future intentions. *See* SMC 22.206.160(C)(1)(e), (f), (m).

By contrast, the 13 just causes that do not use the complaint and certification scheme are all based on past acts by the tenant,¹¹ are the result of regulatory action by the city,¹² or require the landlord to obtain a permit or license before issuing the notice of termination.¹³ The 13 just causes that do not potentially require certification can all be readily verified with objective evidence prior to eviction.

The potential for a post-eviction lawsuit for damages is also reserved for instances where the court cannot know at the time of an eviction hearing whether the landlord will actually follow-through on the stated intent. When the landlord's reason for termination is a planned future act, the Ordinance either requires the landlord to pay relocation

¹¹ SMC 22.206.160(C)(1)(a), (b), (c), (d), (g), (p).

¹² SMC 22.206.160(C)(1)(j), (k), (l), (n).

¹³ SMC 22.206.160(C)(1)(h), (i). The lone exception to this division is just cause (p), which allows a landlord to terminate a tenancy when landlord and tenant share the same home.

expenses¹⁴ or gives the tenant a cause of action for damages if the landlord does not carry out that intent.¹⁵ Again, this distinction within the Ordinance recognizes that a pre-eviction trial on a future intent is infeasible and provides alternative remedies.

Seattle made a policy choice when it created the remedies in the Ordinance. The landlord proves his or her intent by certifying it prospectively and carrying it out retrospectively. The available remedies correspond to the available evidence.

E. The Respondents requests attorney's fees on appeal

Under RAP 18.1, a prevailing party may be awarded fees on appeal if there is a basis in law, contract, or equity to award them. The RLTA provides for reasonable attorney's fees if the landlord prevails in litigation. RCW 59.18.410. Both the trial court and the Court of Appeals awarded attorney's fees to Faciszewski and Klamon. They request reasonable attorney's fees and costs should they prevail.

V. CONCLUSION

Courts do not engage in speculative litigation, they are the domain of fact. Brown and Wahleithner ask this court to interpret the Ordinance to encourage slow, speculative trials that attempt to predict the future. The

¹⁴ SMC 22.206.160(C)(1)(j), (1)(2), (m), (n). Subpart (n) provides for relocation assistance pursuant to SMC 22.206.260.

¹⁵ SMC 22.206.160(C)(1)(e), (f), (h).

Ordinance recognizes that the future is uncertain. It provides a method for a landlord to certify intent to take a future act and obtain relief based on that certification. If the landlord does not certify, or if does not follow-through on that certification, there are consequences. This court should follow the language and intent of the Ordinance and reserve trials for determining facts, not for speculation.

Respectfully submitted this 2nd day of September, 2016.

LOEFFLER LAW GROUP PLLC



Christopher D. Cutting
WSBA No. 41730
Attorney for Respondents

Certificate of Service

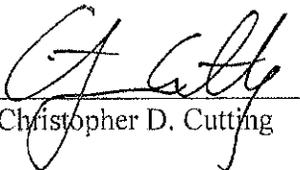
I hereby certify that on September 2, 2016, I caused to be served the foregoing on the following parties by delivering to the following address:

T. Jeffrey Keane
Keane Law Offices
100 NE Northlake Way, Suite 200
Seattle WA 98105

Allyson O'Malley-Jones
Northwest Justice Project
401 Second Avenue S., Suite 704
Seattle, WA 98104

By: U.S. Postal Service, ordinary first class mail
 U.S. Postal Service, certified or registered mail
 return receipt requested
 legal messengers
 E-mail

DATED 10th day of July, 2015, at Seattle, Washington



Christopher D. Cutting

SMC 22.206.160 (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:
 - (a) The tenant fails to comply with a three day notice to pay rent or vacate pursuant to RCW 59.12.030(3); a ten day notice to comply or vacate pursuant to RCW 59.12.030(4); or a three day notice to vacate for waste, nuisance (including a drug-related activity nuisance pursuant to RCW Chapter 7.43) or maintenance of an unlawful business or conduct pursuant to RCW 59.12.030(5);
 - (b) The tenant habitually fails to pay rent when due which causes the owner to notify the tenant in writing of late rent four or more times in a 12 month period;
 - (c) The tenant fails to comply with a ten day notice to comply or vacate that requires compliance with a material term of the rental agreement or that requires compliance with a material obligation under RCW 59.18;
 - (d) The tenant habitually fails to comply with the material terms of the rental agreement which causes the owner to serve a ten day notice to comply or vacate three or more times in a 12 month period;
 - (e) The owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence and no substantially equivalent unit is vacant and available in the same building. "Immediate family" shall include the owner's domestic partner registered pursuant to Section 1 of Ordinance 1172442 or the owner's spouse, parents, grandparents, children, brothers and sisters of the owner, of the owner's spouse, or of the owner's domestic partner. There shall be a rebuttable presumption of a violation of this subsection 22.206.160C.1.a if the owner or a member of the owner's immediate family fails to occupy the unit as that person's principal residence for at least 60 consecutive days during the 90 days

immediately after the tenant vacated the unit pursuant to a notice of termination or eviction using this subparagraph as the cause for eviction;

- (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;
- (g) The tenant's occupancy is conditioned upon employment on the property and the employment relationship is terminated;
- (h) The owner seeks to do substantial rehabilitation in the building; provided that, the owner must obtain a tenant relocation license if required by Chapter 22.210 and at least one permit necessary for the rehabilitation, other than a Master Use Permit, before terminating the tenancy;
- (i) The owner (i) elects to demolish the building, convert it to a cooperative, or convert it to a nonresidential use; provided that, the owner must obtain a tenant relocation license if required by Chapter 22.210 and a permit necessary to demolish or change the use before terminating any tenancy, or (ii) converts the building to a condominium provided the owner complies with the provisions of Sections 22.903.030 and 22.903.035;
- (j) The owner seeks to discontinue use of a housing unit unauthorized by Title 23 after receipt of a notice of violation thereof. The owner is required to pay relocation assistance to the tenant(s) of each such

unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

- 1) \$2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the County median income, or
 - 2) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the County median income;
- (k) The owner seeks to reduce the number of individuals residing in a dwelling unit to comply with the maximum limit of individuals allowed to occupy one dwelling unit, as required by Title 23, and:
- 1)
 - a) The number of such individuals was more than is lawful under the current version of Title 23 or Title 24 but was lawful under Title 23 or 24 on August 10, 1994;
 - b) That number has not increased with the knowledge or consent of the owner at any time after August 10, 1994; and
 - c) The owner is either unwilling or unable to obtain a permit to allow the unit with that number of residents.
 - 2) The owner has served the tenants with a 30 day notice, informing the tenants that the number of tenants exceeds the legal limit and must be reduced to the legal limit,
 - 3) After expiration of the 30 day notice, the owner has served the tenants with and the tenants have failed to comply with a ten day notice to comply with the limit on the number of occupants or vacate, and
 - 4) If there is more than one rental agreement for the unit, the owner may choose which agreements to terminate; provided that, the owner may either terminate no more than the minimum number of rental agreements necessary to comply with the legal limit on the number of occupants, or, at the owner's option, terminate only those agreements involving the minimum number of occupants necessary to comply with the legal limit;
- (l) 1) The owner seeks to reduce the number of individuals who reside in one dwelling unit to comply with the legal limit after receipt of a notice of violation of the Title 23 restriction on the number of individuals allowed to reside in a dwelling unit, and:
- a) The owner has served the tenants with a 30 day notice, informing the tenants that the number of tenants exceeds the legal limit and must be reduced to the legal limit; provided that, no 30 day notice is required if the

number of tenants was increased above the legal limit without the knowledge or consent of the owner;

b) After expiration of the 30 day notice required by subsection 22.206.160.1.1.a above, or at any time after receipt of the notice of violation if no 30 day notice is required pursuant to subsection 22.206.160.1.1.a, the owner has served the tenants with and the tenants have failed to comply with a 10 day notice to comply with the maximum legal limit on the number of occupants or vacate; and

c) If there is more than one rental agreement for the unit, the owner may choose which agreements to terminate; provided that, the owner may either terminate no more than the minimum number of rental agreements necessary to comply with the legal limit on the number of occupants, or, at the option of the owner, terminate only those agreements involving the minimum number of occupants necessary to comply with the legal limit.

2) For any violation of the maximum legal limit on the number of individuals allowed to reside in a unit that occurred with the knowledge or consent of the owner, the owner is required to pay relocation assistance to the tenant(s) of each such unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

a) \$2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the county median income, or

b) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the county median income;

(m) The owner seeks to discontinue use of an accessory dwelling unit for which a permit has been obtained pursuant to Sections 23.44.041 and 23.45.545 after receipt of a notice of violation of the development standards provided in those sections. The owner is required to pay relocation assistance to the tenant household residing in such a unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

1) \$2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the county median income, or

- 2) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the county median income;
- (n) An emergency order requiring that the housing unit be vacated and closed has been issued pursuant to Section 22.206.260 and the emergency conditions identified in the order have not been corrected;
- (o) The owner seeks to discontinue sharing with a tenant of the owner's own housing unit, i.e., the unit in which the owner resides, seeks to terminate the tenancy of a tenant of an accessory dwelling unit authorized pursuant to Sections 23.44.041 and 23.45.545 that is accessory to the housing unit in which the owner resides or seeks to terminate the tenancy of a tenant in a single-family dwelling unit and the owner resides in an accessory dwelling unit on the same lot. This subsection 22.206.160.C.1.o does not apply if the owner has received a notice of violation of the development standards of Section 23.44.041. If the owner has received such a notice of violation, subsection 22.206.160.C.1.m applies;
- (p) A tenant, or with the consent of the tenant, his or her subtenant, sublessee, resident or guest, has engaged in criminal activity on the premises, or on the property or public right-of-way abutting the premises, and the owner has specified in the notice of termination the crime alleged to have been committed and the general facts supporting the allegation, and has assured that the Department of Planning and Development has recorded receipt of a copy of the notice of termination. For purposes of this subsection 22.206.160.C.1.p a person has "engaged in criminal activity" if he or she:
 - 1) Engages in drug-related activity that would constitute a violation of RCW Chapters 69.41, 69.50 or 69.52, or
 - 2) Engages in activity that is a crime under the laws of this state, but only if the activity substantially affects the health or safety of other tenants or the owner.
2. Any rental agreement provision which waives or purports to waive any right, benefit or entitlement created by this subsection 22.206.160.C.1.p shall be deemed void and of no lawful force or effect.
3. With any termination notices required by law, owners terminating any tenancy protected by this section 22.206.160 shall advise the affected tenant or tenants in writing of the reasons for the termination and the facts in support of those reasons.

4. If a tenant who has received a notice of termination of tenancy claiming subsection 22.206.160.C.1.e, C.1.f, or C.1.m as the ground for termination believes that the owner does not intend to carry out the stated reason for eviction and makes a complaint to the Director, then the owner must, within ten days of being notified by the Director of the complaint, complete and file with the Director a certification stating the owner's intent to carry out the stated reason for the eviction. The failure of the owner to complete and file such a certification after a complaint by the tenant shall be a defense for the tenant in an eviction action based on this ground.
5. In any action commenced to evict or to otherwise terminate the tenancy of any tenant, it shall be a defense to the action that there was no just cause for such eviction or termination as provided in this section 22.206.160.
6. It shall be a violation of this section 22.206.160 for any owner to evict or attempt to evict any tenant or otherwise terminate or attempt to terminate the tenancy of any tenant using a notice which references subsections 22.206.160.C.1.e, 1.f, 1.h, 1.k, 1.l, or 1.m as grounds for eviction or termination of tenancy without fulfilling or carrying out the stated reason for or condition justifying the termination of such tenancy.
7. An owner who evicts or attempts to evict a tenant or who terminates or attempts to terminate the tenancy of a tenant using a notice which references subsections 22.206.160.C.1.e, 1.f or 1.h as the ground for eviction or termination of tenancy without fulfilling or carrying out the stated reason for or condition justifying the termination of such tenancy shall be liable to such tenant in a private right for action for damages up to \$2,000, costs of suit or arbitration and reasonable attorney's fees.

OFFICE RECEPTIONIST, CLERK

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Cc: sidney@tal-fitzlaw.com
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Cc: sidney@tal-fitzlaw.com
Subject: Faciszewski v. Brown, No. 92978-5 supplemental brief of respondent

Dear Clerk,
Please find the supplemental brief of the respondent attached for filing in Faciszewski v. Brown, No. 92978-5.

Thank you,

Christopher D. Cutting
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