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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____

No. 38109-5

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JAMES STEWART

Appellant

vs.

TACOMA RESCUE MISSION, d/b/a
JEFFERSON SQUARE APARTMENTS

Respondent

BRIEF OF APPELLANT

NORTHWEST JUSTICE PROJECT
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November 17, 2008

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I. INTRODUCTION

This is an appeal from a trial court decision in an unlawful detainer action. The landlord, the Tacoma Rescue Mission (“TRM”) d/b/a Jefferson Square Apartments (“JSA”) is federally-subsidized under a type of project-based Section 8 housing for homeless persons. The tenant, James Stewart, is a homeless veteran with mental disabilities. The housing assistance payments contract under which TRM receives its federal subsidies, federal regulations, the lease and due process all require TRM not to terminate Stewart’s tenancy without first complying with certain notice requirements and without “good cause.”

The unlawful detainer action was based on a three-day notice to quit for nuisance. Months before the notice was issued, Stewart verbally threatened two other tenants of the JSA at locations away from the apartment building. These and other tenants complained about feeling intimidated by Stewart and about a loud TV or radio. The landlord’s notice cited these complaints and alleged noise from slamming doors late at night.

The trial court erred in not dismissing this action for lack of subject matter jurisdiction due to insufficiency of notice because the notice did not comply with the notice requirements set forth in applicable federal regulations and the lease, because the allegations were ordinary lease

violations and not nuisance, because Stewart was not given an opportunity to cure, and because any breaches of the lease had been waived by acceptance of rent.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in issuing a writ of restitution against the Appellant on February 8, 2008.

2. The trial court erred in entering judgment against the Appellant on July 3, 2008.

3. The trial court erred in not dismissing this action for lack of subject matter jurisdiction due to insufficiency of notice.

4. The trial court erred in not dismissing this action for lack of subject matter jurisdiction because the Respondent waived its right to declare a forfeiture by accepting rent with knowledge of every breach alleged in the notice.

5. The trial court erred in entering a conclusion of law that the Respondent's behavior amounted to nuisance that is not supported by findings of fact.

B. Issues Pertaining to Assignment of Error

1. Whether an unlawful detainer notice that does not comply with applicable HUD regulations is sufficient to provide unlawful detainer

subject matter jurisdiction.

2. Whether an unlawful detainer notice that does not comply with parallel lease provisions incorporating applicable Federal law is sufficient to provide unlawful detainer subject matter jurisdiction.

3. Whether Stewart's verbal threats occurring away from the premises at least several months prior to the issuance of a three-day nuisance notice can constitute nuisance under R.C.W. 59.12.030(5).

4. Whether Stewart's conduct can amount to nuisance when TRM did not allege and the court did not find that he engaged in gang-related or drug-related activity, was arrested, committed physical assaults, or used a deadly weapon.

5. Whether TRM's failure to provide notice with an opportunity to cure prior to issuing the three-day nuisance notice deprived the court of unlawful detainer subject matter jurisdiction.

6. Whether TRM's acceptance of August rent with knowledge of nearly all conduct alleged in the three-day nuisance notice waived its right to declare a forfeiture thereby depriving the trial court of unlawful detainer subject matter jurisdiction.

7. Whether TRM's acceptance of September rent with knowledge of all of the conduct alleged in the three-day nuisance notice waived its right to declare a forfeiture thereby depriving the trial court

unlawful detainer subject matter jurisdiction.

III. STATEMENT OF THE CASE

On January 3, 2006, James Stewart entered into a lease with the TRM for the rental of an apartment at the JSA and moved into Apt. 314. (Ex. 6) At the time of his application to the JSA, Stewart, a disabled Navy veteran, was homeless and receiving case management services through the Veterans Administration (“VA”) (CP 308, Ex. 27) Before approving Stewart’s tenancy, TRM entered into a Case Management/Services Agreement with the VA concerning Stewart. (CP 308, Ex. 26)

TRM owns and operates the JSA, a 42-unit Single Room Occupancy (SRO) studio apartment building for drug and alcohol free homeless individuals. (CP 307, Ex. 1) JSA is subsidized by the U.S. Department of Housing and Urban Development (“HUD”) under its Section 8 Moderate Rehabilitation Program for Single Room Occupancy Dwellings for Homeless Persons. (“Section 8 MR-SRO”) (CP 307, Ex. 1)

TRM received HUD funding under Section 8 MR-SRO to rehabilitate dwelling units at the JSA. (CP 307, Ex. 1) In exchange for the HUD rehabilitation funds, TRM entered into a 10-year Housing Assistance Payments (“HAP”) Contract with the Tacoma Housing Authority (“THA”) on January 7, 1993 to provide Section 8 rental assistance for homeless individuals in rehabilitated SRO housing. (CP

307, Ex. 1) Since the original HAP contract terminated in 2003, TRM has continued to receive monthly HAP payments from HUD through THA for each occupied unit pursuant to annual HAP Contract Renewals. (CP 307, Ex. 1 & 2) The funds for the housing assistance for eligible individuals residing at JSA are provided by HUD through an Annual Contributions Contract between HUD and THA. (Ex. 1)

By entering into the original 10-year HAP contract, and by annually entering a renewal of HAP contract, TRM obligated itself to comply with applicable HUD requirements including the requirement of ¶1.11 “Lease and Termination of Tenancy” that “the lease must include all provisions required by HUD” and “the Owner may not terminate tenancy or evict an assisted individual except in accordance with HUD requirements.” (Ex. 1, at 14; Ex. 2 at ¶5)

TRM served Stewart a three-day “NOTICE TO QUIT FOR WASTE, NUISANCE, OR UNLAWFUL USE OF PREMISES” dated October 9, 2007.¹ (Ex. 5)

The notice references a 10-day comply or vacate notice issued nine months prior to the October 9th notice. (Ex.5) Evidently, this refers to the

¹ The Notice appears in Appendix A to this brief, for ease of reference.

10-day notice dated January 12, 2007 (not January 1, 2007) alleging “you are in violation of community rule #6. Please keep your radio/TV down to a reasonable level.” (Ex. 10) In response to complaints from Stewart’s neighbor Ms. B., TRM issued a 10-day comply or vacate notice on January 12, 2007 requesting that the volume of Defendant’s TV or stereo be kept lower. (CP 309, Ex.10) Ms. B. did not directly ask Stewart to keep the noise down. (CP 309) There is no evidence that TRM issued any subsequent notice to Stewart warning of excessive noise. (CP 306-314). There is no evidence that TRM issued any subsequent notice to Stewart of a breach of a lease covenant with an opportunity to cure. (CP 306-314).

Before issuing the October 9th three-day nuisance notice, TRM issued four 20-day “no cause” termination notices to Stewart dated April 9, 2007, June 6, 2007, July 2, 2007, and August 1, 2007 (CP 310, Ex. 9). In September 2007, TRM commenced an unlawful detainer action against Stewart by serving an unfiled Summons and Complaint dated September 4, 2007 (Ex. 37) based on the August 1st “no cause” notice (Ex. 9), but TRM did not pursue this case.

After commencing the September 2007 unlawful detainer action (Ex. 37) based on the August 1st “no cause” notice (Ex. 9) and before issuing the October 9th notice, TRM obtained written complaints from four JSA tenants. (Ex. 23) These written tenant complaints from Mr. M., Ms. B., Mr. H. and

Mr. B. were obtained between September 13, 2007 and September 28, 2007.

(Ex. 23) The four JSA tenants testified at trial.

JSA tenant Mr. M. reported to TRM on July 28, 2007, that Stewart “has threatened him to beat him up twice off Jefferson Sq grounds once at New Start a couple of weeks ago and today at the Nativity Housing.” (Ex. 29, CP 309-310) TRM obtained Mr. M.’s written complaint about Stewart on September 13, 2007, which repeated and restated the July 2007 verbal complaint about Stewart. (Ex. 23, CP 310) It stated that Stewart “has threatened to assault me. He also wildly accused me of flattening his van tire. Whenever he sees me he assumes a threatening posture and gives a mean mug look trying to intimidate me.” (Ex. 23, CP 309-310)

JSA tenant Mr. B was threatened verbally by Stewart at a site five or six blocks away from the JSA sometime in 2006, ten months or more before the October 9, 2007 notice. (CP 310) TRM obtained Mr. B.’s written complaint about Stewart on September 27, 2007 describing how Stewart “has approached me asking me if I be prejudice [sic] after hearing the answer he wants to hear he informs me that I should be glad that I answered the way I did or he would’ve had to knock the crap out of me.” (Ex. 23) Mr. B. also complained of Stewart’s “derogatory remarks and intimidating looks” but adds “it’s not that his intimidation tactics actually scare me.” (Ex. 23)

TRM obtained Mr. H.'s written complaint about Stewart on September 26, 2007. (Ex. 23) It does not allege any threats but describes incidents of noise caused by Stewart outside of the JSA building. (Ex. 23) TRM obtained two written complaints about Stewart from Ms. B., dated September 17, 2007 and September 26, 2007. (Ex. 23) Ms. B. complained of his "rap music and violent movies" and coming in during the early morning hours and being noisy. (Ex. 23) Ms. B. was the neighbor whose earlier complaints to TRM resulted in the 10-day comply or vacate notice on January 12, 2007 requesting that the volume of Stewart's TV or stereo be kept lower. (CP 309, Ex.10)

TRM accepted Stewart's tender of August 2007 rent on August 3, 2007. (CP 310, Ex. 21) The record contains no evidence that TRM declined to accept Stewart's tender of rent every month through August, 2007. TRM declined Stewart's tender of September 2007 rent on August 31, 2007. (CP 310) On October 10, 2007, Stewart tendered September 2007 and October 2007 rent to TRM. (CP 310, Ex. 22) TRM accepted Stewart's tender of September 2007 rent. (CP 310, Ex. 22) TRM declined to accept Stewart's tender of October 2007 rent. (CP 310)

TRM commenced this unlawful detainer action based on the October 9, 2007 three-day nuisance notice by serving Stewart with an unfiled summons and complaint on October 19, 2007. (CP 6) Stewart appeared

through counsel on October 26, 2007. (CP 8) TRM filed the complaint (CP 1-3) on November 1, 2007, and obtained an ex parte order to show cause. (CP at 11-12) On November 8, 2007, Stewart filed an answer, affirmative defenses and motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted. (CP 13-24)

Following the show cause hearing on November 13, 2007, a pro tem commissioner denied Stewart's motion to dismiss, granted TRM's request for a writ of restitution but stayed execution of the writ to allow Stewart to file a motion for revision. (CP at 144-148) Stewart filed a motion for revision and dismissal, and a hearing was held on December 7, 2007. (CP at 149-167) The trial court denied Stewart's motion to dismiss, granted Stewart's motion for revision, and set the case for trial on January 4, 2008. (CP 168-169)

The trial commenced on January 4, 2008, continued on parts of several days over the following month, and concluded on February 7, 2008. Prior to hearing testimony, the trial court heard Stewart's motion in limine to exclude evidence of lease violations prior to October, 2007. (CP 170-185) On January 7, 2008, TRM filed a motion for reconsideration of the courts January 4th oral ruling on Stewart's motion in limine (CP 283) based on a supplemental memorandum of authorities on waiver. (CP 278-282) The trial court granted the TRM's motion for reconsideration on January 11,

2008. (CP 292) At the close of TRM's case on January 17, 2007, Stewart moved to dismiss, and the trial court denied the motion. (CP 294-295)

The trial court announced its decision following the trial on February 8, 2008 (RP 1-15) and entered an order granting writ of restitution. (CP 304-305) The trial court declined to set an appeal bond in the amount of rent as it accrued and insisted that any bond be sufficient to protect against fear: "I mean, if you want to file a bond, that's fine, but I just don't know how you quantify fear." (RP 12) Stewart vacated the premises prior to execution of the Writ of Restitution. The court's Findings of Fact and Conclusions of Law; and Final Judgment were entered after a presentation hearing on July 3, 2008. (CP at 306-314)

IV. ARGUMENT

A. The Court Erred in Not Dismissing this Case for Lack of Unlawful Detainer Subject Matter Jurisdiction.

Under Washington law, an unlawful detainer notice that is contrary to the requirements of applicable federal law and/or contrary to the terms of the lease, is ineffective to confer subject matter jurisdiction. The court erred in failing to dismiss the unlawful detainer action for lack of unlawful detainer subject matter jurisdiction.

The trial court erred by concluding that TRM "was entitled to rely *solely* upon the state law nuisance notice provisions under R.C.W.

59.12.030(5). 24 C.F.R. § 882.511 allows Plaintiff to proceed under State law unlawful detainer provisions.” (Emphasis added) (CP 312) While accepting that TRM “must comply with 24 C.F.R. § 882.511” in terminating Stewart’s tenancy, the trial court carved out an exception to compliance, contrary to all existing authority, when a landlord characterizes tenant behavior as a “nuisance” and uses a three-day notice to quit under R.C.W. 59.12.030(5). (CP 311-312)

As recognized by the Washington Supreme Court, a notice to terminate a federally-subsidized tenancy must fully comply with the requirements of both state and federal law, and it is possible to satisfy the requirements of both state and federal law by drafting a termination notice that complies with both. *Housing Authority v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990). Here, even if the notice fully complied with state law, and even if Stewart’s behavior did constitute a nuisance, the notice did not comply with the requirements of federal law, and this action should have been dismissed for lack of unlawful detainer subject matter jurisdiction for this reason alone. *Id.*; *King County Housing Authority v. Saylor*, 19 Wn. App. 871, 578 P.2d 76 (1978).

1. **TRM, Like Other Federally Subsidized Landlords, Must Comply with Both Federal Law and State Law in Terminating a Tenancy.**

Applicable federal law governs eviction from federally-subsidized tenancies everywhere within the territorial jurisdiction of the United States, including Pierce County, Washington. Where federal law is applicable, its application is mandatory in all courts, state or federal. U.S. Const. art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810 (1947). State courts have the power and responsibility to consider federal defenses in all cases in which they apply. *Rodriguez v. Westhab, Inc.* 833 F.Supp. 425 (S.D.N.Y. 1993). For a state or federal court to issue an order contrary to a valid federal defense would be a violation of federal law. *Id.* In eviction proceedings, state court judges must consider federal defenses and apply federal law. *Id.*

Under ¶1.11B of the HAP Contract between TRM and THA, TRM “may not terminate tenancy or evict an assisted individual except in accordance with HUD requirements.” (Ex. 1) The HUD requirements for terminations of tenancies under the Section 8 Moderate Rehabilitation SRO for Homeless Individuals Program are governed by 24 C.F.R. § 882.511. 24 C.F.R. § 882.808(l).

Tenants, like Stewart, whose housing is federally-subsidized have procedural and substantive defenses to eviction that are not available to tenants whose housing is not federally-subsidized. Washington law permits a landlord to evict a tenant through an unlawful detainer action if

any of seven jurisdictional prerequisites set forth in R.C.W. 59.12.030 is present. *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978). Nonsubsidized residential periodic tenancies can be terminated with a 20-day “no cause” notice. R.C.W. 59.12.030(2). Nonsubsidized residential term tenancies can be terminated with or without notice upon expiration of the lease term. R.C.W. 59.12.030(1).

Over the years, the U.S. Government has developed a variety of programs to assist in providing housing to low-income people through subsidies to public housing authorities, private developers and private landlords. *See e.g.*, Vol. 1C Kunch §88.15 (1997). Federally-subsidized landlords must comply with the provisions of the contracts they enter into with the U.S. Government and with the provisions of the leases they enter into with federally-subsidized tenants. In addition, compliance with relevant federal statutes, administrative regulations, and administrative handbooks, is mandatory. *Thorpe v. Housing Authority*, 393 U.S. 268, 89 S.Ct. 518 (1969); *Blakely v. Housing Authority of King Co.*, 8 Wn.App. 204, 505 P.2d 151(1973).

When terminating an assisted tenancy, federally-subsidized landlords must comply with applicable federal regulations. *King County Housing Authority v. Saylor*, 19 Wn. App. 871, 578 P.2d 76 (1978). Washington law authorizes tenants to assert in an unlawful detainer action

any legal or equitable defense or setoff arising out of the tenancy. R.C.W. 59.18.380; R.C.W. 59.18.400. The failure to comply with the due process requirement of adequate notice incorporated into federal regulations pertaining to termination of tenancies can be asserted as a defense to an unlawful detainer action. *Saylor*, at 874.

The Washington Supreme Court has held that a federally-subsidized landlord cannot substitute a federal notice for a state law unlawful detainer notice. *Terry*, at 563. “Congress may have intended to create its own notice provisions for termination of leases, but, in leaving eviction proceedings to the states for enforcement, Congress necessarily relied upon existing state substantive law.” *Id.* at 566. Because compliance with federal notice requirements is mandatory, a federally-subsidized landlord cannot substitute a state law unlawful detainer notice for a federal notice. *Id.* It is possible to satisfy the requirements of both state R.C.W. 59.12.030 and with federal law notice requirements by drafting a termination notice that complies with both. *Id.* at 568-69.

2. **TRM, Like Other Federally-Subsidized Landlords, Cannot Terminate an Assisted Tenancy Without Good Cause and Without Due Process.**

Federally-subsidized landlords generally cannot terminate or fail to renew the tenancy and subsidy of a tenant without good cause and without providing the procedural due process requirements of adequate notice and

an opportunity to be heard before terminating assistance. These requirements initially grew out of due process litigation in the 1960s and 1970s.²

The requirement that federally-subsidized landlords cannot terminate or fail to renew a tenancy and subsidy without good cause has since been codified in statutes, regulations, and administrative manuals, and is usually incorporated into the tenant's lease.³ Tenant protections from eviction except for good cause under the Section 8 Moderate Rehabilitation SRO for Homeless Individuals Program are set forth in 24 C.F.R. § 882.511(c):

The Owner must not terminate or refuse to renew the lease except upon the following grounds: (1) Serious or repeated violation of the terms and conditions of the lease. (2) Violation of applicable Federal, State or local law. (3) Other good cause.

Parallel language requiring good cause to evict is included in ¶9(a) of the lease between TRM and Stewart. (Ex. 6)

² See e.g., *Caulder v. Durham Housing Authority*, 433 F.2d 988 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.1970), cert. denied, 400 U.S. 853 (1970); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *McQueen v. Druker*, 317 F.Supp. 1122 (D.Mass. 1970), aff'd, 438 F.2d 781 (1st Cir. 1971); *Appel v. Beyer*, 39 Cal.App.3d Supp. 7 (1974); *Lopez v. Henry Phipps Plaza S. Inc.*, 498 F.2d 937 (2d Cir. 1974); *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180 (6th Cir. 1984); *Simmons v. Drew*, 716 F.2d 1160 (7th Cir. 1983).

³ See e.g., 24 C.F.R. § 966.4(l)(2); 24 C.F.R. § 247.3; 24 C.F.R. § 882.511(c); 24 C.F.R. § 880.607(b); 24 C.F.R. § 881.601; 24 C.F.R. § 883.701; 24 C.F.R. § 884.216; 24 C.F.R. § 886.328; and 24 C.F.R § 982.310.

The requirement that federally-subsidized landlords cannot terminate a tenancy or housing subsidy without adequate notice and an opportunity to be heard has also since been codified in statutes, regulations, and administrative manuals, and is usually incorporated into the tenant's lease. *See e.g.*, 24 C.F.R. §247 (applies to many types of HUD-subsidized Multifamily housing); 24 C.F.R. §880.607 (applies to Section 8 New Construction and Section 8 Substantial Rehabilitation); 24 C.F.R. § 882.511 (applies to Section 8 Moderate Rehabilitation). Some federally-subsidized housing programs, such as Conventional Public Housing (24 C.F.R. § 966.51-57) and the Section 8 Housing Choice Voucher Program (24 C.F.R. § 982.555) provide for separate administrative grievance hearings prior to termination, whereas others, including the Section 8 Moderate Rehabilitation SRO for Homeless Individuals Program at issue in this case, rely solely on specific federal notice requirements and a hearing in a state court eviction proceeding.

3. **TRM Failed to Provide Stewart with an Adequate Notice of Termination as Required by Due Process, 24 C.F.R. § 882.511 and the Lease.**

Before a federally-subsidized tenancy can be terminated, the landlord must serve an adequate notice detailing the reasons for a proposed termination. *Saylor*, 19 Wn. App. 871. The specific due process notice requirements for terminating tenancies under the Section 8

Moderate Rehabilitation SRO Program are set forth in 24 C.F.R. § 882.511 and are incorporated into every lease.

The October 9, 2007 notice of termination (Ex. 5) that TRM provided to Stewart did not comply with the due process requirements set forth in 24 C.F.R. § 882.511 and incorporated into the lease. (Ex.9) 24 C.F.R. § 882.511(d) provides:

(d) Notice of termination of tenancy. (1) The Owner must serve a written notice of termination of tenancy on the Family which states the date the tenancy shall terminate. Such date must be in accordance with the following: (i) When termination is based on failure to pay rent, the date of termination must be not less than five working days after the Family's receipt of the notice. (ii) When termination is based on serious or repeated violation of the terms and conditions of the lease or on violation of applicable Federal, State or local law, the date of termination must be in accordance with State and local law. (iii) When termination is based on other good cause, the date of termination must be no earlier than 30 days after the notice is served on the Family. (2) The notice of termination must: (i) State the reasons for such termination with enough specificity to enable the Family to prepare a defense. (ii) Advise the Family that if a judicial proceeding for eviction is instituted, the tenant may present a defense in that proceeding. (iii) Be served on the Family by sending a prepaid first class properly addressed letter (return receipt requested) to the tenant at the dwelling unit or by delivering a copy of the notice to the dwelling unit.

The October 9, 2007 termination notice did not comply with 24 C.F.R. § 882.511(d) and ¶9(f) of the lease in the following ways: (1) it failed to set forth a factual statement of the grounds for termination of tenancy with

sufficient specificity to enable Stewart to prepare a defense; (2) it failed to state the date on which the Stewart's tenancy terminates; (3) it failed to advise of the right to present a defense in a judicial proceeding; and (4) it failed to comply with the appropriate State law notice requirements for terminating a tenancy for serious or repeated violations of a lease.

a. **The Notice Failed to Set Forth a Factual Statement of the Grounds for Termination of Tenancy Sufficient To Enable Stewart to Prepare a Defense.**

Under 24 C.F.R. § 882.511(d)(2), “the notice of termination must: (i) state the reasons for such termination with enough specificity to enable the Family to prepare a defense.” *See also*, Lease ¶9(f)(2). (Ex. 6) This language is nearly identical to the language in the regulations governing terminations in most other HUD project-based Section 8 housing. 24 C.F.R. § 247.4(2) requires that the notice to terminate must “state the reasons for the landlord’s action with enough specificity so as to enable the tenant to prepare a defense.” The purpose for requiring that the notice state the grounds for termination with specificity is “to insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence.” *Saylor*, at 874, *quoting*, *Escalera*, 425 F.2d 853.

The specificity of notice requirement is related to the requirement

that federally-subsidized landlords cannot terminate or fail to renew a tenancy except for serious or repeated violations of his lease, violations of applicable federal, state, or local law, or other good cause. 24 C.F.R. § 882.511(b); 24 C.F.R. § 247.3. The importance of this specificity of notice requirement is underscored by the fact that, in any judicial action brought to evict a tenant, a landlord may not rely on any grounds which are different from the reasons set forth in the notice. See, e.g., 24 C.F.R. § 247.6(b) (“In any judicial action instituted to evict the tenant, the landlord must rely on grounds which were set forth in the termination notice.”); 24 C.F.R. § 880.607(c)(3); *Moon v. Spring Creek Apartments* 11 S.W.3d 427, 433 (Tex.App 2000); *Associated Estates Corp. v. Bartell*, 492 N.E. 2d 841, 846 (1985).

Many courts have held that when a landlord fails to comply with due process and HUD notice requirements by framing the notice in vague and conclusory language or by failing to set forth a factual statement justifying termination, the eviction lawsuit must be dismissed. Where a federally-subsidized landlord fails to comply with HUD-mandated notice requirement of specificity, the unlawful detainer action must be dismissed. *Saylors*, 19 Wn. App. 871. In *Saylors*, the Court of Appeals reversed a trial court's decision granting judgment in favor of the landlord in an unlawful detainer action on the ground that the unlawful detainer notice

alleging nuisance did not comply with the federal law requirement of specificity. 19 Wn. App. at 872-75. The notice in *Saylor*s, stated: “You are in violation of your lease in Section 6j: the tenant shall not commit or maintain a nuisance on or about the premises.” *Id.* at 874. Emphasizing that the notice “failed to set forth a factual statement of the incident or incidents which constituted the grievance,” the Court of Appeals concluded that the “vague and conclusory” notice was inadequate to provide the required opportunity to prepare a defense as required by due process and HUD regulations. *Id.* at 874. The court reversed the unlawful detainer judgment.

In a 9th Circuit case, *Swords to Plowshares v. Smith*, 294 F.Supp.2d 1067 (2002), arising out of an eviction by a project-based Section 8 landlord of a tenant with a nuisance notice, the court held that despite allegations that the tenant threatened other tenants with a deadly weapon and committed actual violence towards other tenants on the premises, and despite the existence of some level of detail in the notice, the nuisance notice did not contain the degree of specificity required by due process and HUD regulations because it did not identify the alleged victims or the time or date of the incidents. at 1073.

Many other courts have found that termination notices framed in vague and conclusory language or that fail to set forth a factual statement

of the incident or incidents constituting a violation sufficient to justify termination are insufficient to terminate a federally-subsidized tenancy.⁴

The October 9, 2007 termination notice issued to Stewart is similarly deficient. (Ex. 5) It contains only vague and conclusory allegations about noise and threatening behavior and fails to state the reasons for the termination with enough specificity to enable him to prepare a defense. The notice does not describe the nature of the evidence against him so that he can effectively rebut that evidence. The notice does not identify the time, date or place of any of the alleged incidents, and does not identify any alleged victims or persons who have complained about Stewart.

One reason the notice does not describe the date or place of the alleged incidents is that they were remote in time and place. The trial testimony revealed that the verbal threats occurred in July 2007 and in 2006 at locations away from the Jefferson Square Apartments and that the

⁴ See e.g., *Driver v. Housing Authority of Racine County*, 713 N.W.2d 670 (2006); *Nealy v. Southlawn Palms Apts.* 196 S.W.3d 386 (Tex.App. Houston 2006); *Cuyahoga Metropolitan Housing Authority v. Younger*, 93 Ohio App.3d 819, 639 N.E.2d 1253 (1994); *Edgecomb v. Housing Authority of the Town of Vernon*, 824 F. Supp. 312, 314-315 (D. Conn. 1993); *Housing Authority of DeKalb County v. Pyrtle*, 167 Ga.App. 181, 183, 306 S.E.2d 9 (1983); *Cuyahoga Metropolitan Housing Authority v. Younger*, 93 Ohio App.3d 819, 639 N.E.2d 1253 (1994); *Escalera*, 425 F.2d 853; *Pleasant Hill Estates Associates v. Milovich*, 33 Pa. D. & C. 4th 74 (1996); *Moon v. Spring Creek Apartments*, 11 S.W.3d 427 (Tex.App. 2000); *Associated Estates Corp. v. Bartell*, 492 N.E.2d 841, 24 Ohio App. 3d 6 (1985).

only written notice concerning noise was given in January 2007, nine months before the October 9th notice. (CP 309-310, Ex. 5 & 10)

b. **The Notice Fails to State the Date On Which the Tenancy Shall Terminate.**

Under 24 C.F.R. § 882.511(d)(1) “The Owner must serve a written notice of termination of tenancy on the Family which states the date the tenancy shall terminate.” *See also*, Lease ¶9(f)(1). (Ex. 6) The federal regulations governing evictions from most HUD Multifamily housing programs contains a nearly identical provision. 24 C.F.R. § 247. 24 C.F.R. § 247.4(a)(1) requires that the notices to terminate tenancy “shall: (1) [s]tate that the tenancy is terminated on a date specified therein.”

The Rhode Island Supreme Court has held that this federal regulation and a parallel lease provision incorporating this language “clearly require an explicitly-stated date for termination of the lease.” *Hedco Limited v. Blanchette*, 763 A.2d 639, 643 (R.I. 2000). In a non-payment of rent case in which the notice fully complied with state law, the Rhode Island Supreme Court upheld the dismissal of an eviction action for lack of subject matter jurisdiction solely on the ground that the notice failed to state an explicit date for the termination of the lease.

The termination notice at issue here complies with state regulation . . . but it failed to meet the higher standard required by the regulation for federally subsidized housing set forth in 24 C.F.R. § 247.4(a)(1) and paragraph 23(c) of

tenant's lease. An examination of the record persuades us that both the federal regulation and lease clearly require an explicitly-stated date for termination of the lease. Because service of a valid and proper notice to quit is a condition precedent to maintaining a trespass and ejectment action, plaintiff failed to properly invoke the jurisdiction of the court. . . . Therefore, the motion justice was correct in dismissing the case because the court's subject matter jurisdiction was not invoked properly.

Id.

Because the notice issued in this case (Ex. 5) does not state the exact date of termination of tenancy, it does not comply with 24 C.F.R. § 882.511(d)(1) or the lease. The failure to meet this higher standard of federal law requires dismissal of the action for failure properly to invoke the jurisdiction of the court. *See, Terry.*

c. **The Notice Fails to Advise Stewart that He May Present a Defense in a Judicial Proceeding.**

Under 24 C.F.R. § 882.511(d)(2)(ii), the notice to terminate tenancy must “advise the Family that if a judicial proceeding for eviction is instituted, the tenant may present a defense in that proceeding.” Similarly, 24 C.F.R. §247.4(a)(3) requires that the notice of termination of tenancy must “advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense.”

At least one court has determined that failure to include this language in the notice is a “fatal defect.” *Church Street South Limited Partnership v. Harding*, 1993 WL 560771 (Conn. Super. 1993). In another case, a federal court enjoined the filing of an eviction action in state court because the notice of termination of tenancy did not say that the tenant had the right to present a defense to the eviction in court. *Leake v. Ellicott Redevelopment Phase II*, 470 F. Supp. 600, 602 (W.D.N.Y.1979). Similarly, in *Versailles Arms Apts. v. Pete*, 545 So.2d 1193 (La. Ct. App. 1989), the court held that the project-based Section 8 landlord’s failure to include in the notice of termination language advising the tenant that he/she has 10 days within which to discuss the termination of tenancy with the landlord as required by the and the applicable HUD Handbook and HUD Model Lease justified dismissal of the eviction action. In a public housing context, courts have held that the failure to include similar language mandated by federal regulations deprives the court of jurisdiction to award possession and requires dismissal. *Housing Authority of the City of Newark v. Raindrop*, 287 NJ Super. 222, 670 A.2d 1087 (App.Div.1996); *Housing Authority Of Dekalb County v. Pyrtle*. 167 Ga.App. 181, 306 S.E.2d 9 (1983).

The October 9, 2007 notice (Ex. 5) does not comply with 24 C.F.R. § 882.511(d)(2)(ii) because it fails to advise Stewart that if a judicial

proceeding for eviction is instituted, he may present a defense in that proceeding. The failure to provide a notice that complied, required the trial court to dismiss the action for failure properly to invoke the jurisdiction of the court. *See, Terry*.

4. **The October 9th Notice Did Not Confer Unlawful Detainer Subject Matter Jurisdiction Because It was Contrary to the Terms of the Lease.**

Powers of termination must be exercised strictly in the manner provided in the termination clause of the lease. Wash. Prac. Vol. 17 Stoebuck and Weaver § 6.76 (2004). It is well established Washington law that if a notice to vacate is contrary to the terms of the lease, it is ineffective to terminate the lease or to confer subject matter jurisdiction in an unlawful detainer proceeding. *Gray v. Gregory*, 36 Wn.2d 416, 218 P.2d 307 (1950); *Community Investments, LTD v. Safeway*, 36 Wn.App. 34, 671 P.2d 289 (1983). Tenants have a contractual right to invoke the provisions of the lease for their benefit and protection. *Gray*, at 419. Landlords cannot prove a cause of action for forfeiture of a lease, without pleading and proving compliance with the lease provisions on forfeiture. *Id.* The parties to a lease may contract for additional tenant eviction protections, including longer notice periods, than are required by R.C.W. 59.12. *Safeway*, 36 Wn.App. 34 A unlawful detainer notice that complies with R.C.W. 59.12.030 but is contrary to the terms of the lease

regarding termination notices, does not confer unlawful detainer subject matter jurisdiction and should result in dismissal. *Community Investments v. Safeway* 36 Wn. App. 34, 671 P.2d 289 (1983).

Here, the federal law notice requirements are incorporated into the lease at ¶9(f) (Ex. 1 & 6) The October 9, 2007 notice is contrary to ¶9(f)(1) in that it does not state the date the tenancy shall terminate, and is contrary to ¶9(f)(2) in that it does not state the reasons for the termination with sufficient specificity. Because it is contrary to the terms of the lease, the notice is ineffective to terminate Stewart's tenancy, and is insufficient properly to invoke unlawful detainer notice jurisdiction.

5. Under Washington Law, a Deficient Unlawful Detainer Notice Cannot Invoke Unlawful Detainer Subject Matter Jurisdiction and Requires Dismissal

Because the unlawful detainer statute is summary in nature and in derogation of the common law, it must be strictly construed in favor of the tenant. *Terry*, 114 Wn.2d at 563; *Wilson v. Daniels*, 31 Wn. 2d 633, 198 P.2d 496 (1948). Under Washington law, the adequacy of the unlawful detainer notice is jurisdictional. *Sowers v. Lewis*, 49 Wn.2d 891, 307 P.2d 1064 (1957). When federal law applies, an unlawful detainer notice must comply with requirements of both state and federal law. *Terry*, 114 Wn.2d 558. If a federally-subsidized landlord fails to comply with HUD-mandated notice requirements, the unlawful detainer action must be dismissed.

Housing Authority v. Saylor, 19 Wn. App. 871, 578 P. 2d 76 (1978).

Courts in other jurisdictions have considered the consequences of a federally-subsidized landlord's failure to provide a notice of termination that complies with applicable federal law. In those jurisdictions where, as in Washington, unlawful detainer notices are jurisdictional, courts have, like Washington, held that the consequence of failing to provide a notice that complies with applicable federal law is a lack of jurisdiction requiring dismissal.⁵

B. The Court Erred in Concluding That TRM Met Its Burden of Proving a Cause of Action for Nuisance Under R.C.W. 59.12.030(5).

The trial court erred in concluding that TRM met its burden of proving a cause of action for nuisance under R.C.W. 59.12.030(5). R.C.W. 59.12.030(5) provides that a statutory unlawful detainer notice may be given when a tenant:

commits or permits waste upon the demised premises, or when he sets up or carries on thereon any unlawful business, or when he erects, suffers, permits, or maintains on or about the premises any nuisance, and maintains in possession after the service . . . upon him of three days' notice to quit.

⁵ Such jurisdictions include Rhode Island, New Jersey, New York, Connecticut, and Ohio. *Hedco Limited v. Blanchette*, 763 A.2d 639 (R.I. 2000); *Riverview Towers Assocs. v. Jones*, 358 N.J.Super. 85, 817 A.2d 324 (2003); *Cent. Brooklyn Urban Dev. Corp. v. Copeland*, 122 Misc.2d 726, 471 N.Y.S.2d 989 (1984); *Jefferson Garden Associates v. Greene*, 202 Conn. 128, 143 (1987); *Bella Vista Apartments v. Herzner*, 125 Ohio Misc.2d 1, 4, 796 N.E.2d 593, 595 (2003).

R.C.W. 59.12.030(5). TRM did not allege that Stewart caused waste or engaged in any unlawful business. Rather, TRM alleges that Stewart's behavior including a loud TV or radio, other noise, verbal threats away from the premises, and intimidating looks amounted to nuisance.

Under R.C.W. 59.18.130(5), tenants have a statutory duty not to permit a nuisance. There is no definition of nuisance provided in either R.C.W. 59.12 or in R.C.W. 59.18. There are two general definitions of nuisance in R.C.W. 7.48. R.C.W. 7.48.010 defines an actionable nuisance as:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

R.C.W. 7.48.120 defines nuisance as:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

Prosser and Keeton refer to the law surrounding the word “nuisance” as an “impenetrable jungle” which has “meant all things to all people.” The term has been “applied indiscriminately” and is often seized upon as a “catchword” that is too often “a substitute for any analysis of a problem.” Prosser and Keeton, *The Law of Torts*, § 86 (5th Ed. 1989) Prosser and Keeton decry the “tendency of courts to seize upon this catchword as a substitute for any analysis of a problem. The defendant’s interference with the plaintiff’s interests is characterized as a “nuisance,” and there is nothing more to be said.” Similarly, in their treatise on Property, Cunningham, Stoebuck and Whitman state that “the word ‘nuisance’ has had an extremely elastic meaning; sometimes it is little more than a pejorative term, a weasel word used as a substitute for reasoning.” Cunningham, Stoebuck and Whitman, *The Law of Property*, § 7.2 (1984).

Nuisance is a field of tort liability rather than a single type of tortious conduct. Its principles are necessarily imprecise requiring a balancing of “rights, interests, and convenience” and depending upon the facts of the individual case. *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254, 248 P.2d 380 (1952). What provides unity is the interest invaded, the use and enjoyment of land. Wilson, *Nuisance as a Modern Mode of Land Use Control*, 46 Wash. L.Rev. 47, 56 n. 27 (1970). An actionable private

nuisance is an unreasonable interference in the use and enjoyment of property caused by an unreasonable use of other property. *Riblet*, at 254.

A nuisance will not be found unless there is a substantial interference with another person's ability to use their property. *Peterson v. King County*, 45 Wn.2d 860, 863, 278 P.2d 774 (1954) It is not enough that the act complained of “is productive of inconvenience, or shocks the taste, or diminishes the value of property in the vicinity, or causes a reduction in rentals.” *Tarr v. Hopewell Community Club*, 153 Wn. 214, 217, 279 P. 584 (1929), quoting, *Crawford v. Central Steam Laundry*, 78 Wn. 355, 357, 139 P. 56 (1914). In order to establish a nuisance there must be either tangible injury to property or extreme physical discomfort. *Id.* The “enjoyment of one’s premises must be sensibly diminished, either by actual tangible injury to the property or by the promotion of such physical discomforts as detract sensibly from the ordinary enjoyment of life.” *Id.* In addition, the duration of the interference with the use of property is important. “Some degree of permanence” is an essential element of a nuisance. *Reese v. Wells*, 73 A.2d 899, 902 (D.C. 1950).

There is not a single reported case in Washington in which a nuisance cause of action under R.C.W. 59.12.030(5) has been applied to a residential tenancy. A nuisance cause of action under R.C.W. 59.12.030(5) has historically only been used to apply to commercial tenancies. The

handful of reported Washington landlord-tenant cases involving a nuisance cause of action have been commercial, not residential, and the alleged nuisance has been, for example, extreme pollution or vibrations coming from commercial or industrial enterprises, not behavioral issues of a residential tenant.

1. Stewart's Conduct Did Not Amount to Nuisance.

In order to prevail on a nuisance theory the landlord must prove that the alleged conduct rises to the level of a nuisance. Nuisance laws do not apply to routine lease violations or alleged disorderly conduct of a residential tenant. The allegations against Stewart concern allegations of ordinary lease violations rather than nuisance. The allegations involve isolated incidents over a 2 year period of time that do not rise to the level of nuisance. Noisy televisions and/or radios, slammed doors, curfew violations, and verbal threats, as alleged in the October 9, 2007 notice, are possibly lease violations for which the remedies include a notice under R.C.W 59.12.030(4) or R.C.W. 59.18.180. Such allegation may also constitute "good cause" to evict under 24 C.F.R. § 882.511 and the lease, but they cannot constitute nuisance under Washington law.

Stewart's conduct was not a substantial enough interference with the TRM's use and enjoyment of its property to amount to a nuisance. Nor did it amount to "unlawfully" doing an act or omitting to perform a

duty. It constituted ordinary breaches of a lease covenant for which TRM had other remedies. Moreover, in balancing the rights, interests, and convenience of the parties, the impact to Stewart of being evicted, losing his home, losing his right to continue to reside in a subsidized apartment that is affordable, and returning to a bleak life of homelessness far exceeds the impact on TRM of providing notices that comply with its lease, its HAP Contract, federal regulations and state law before terminating a tenancy.

2. **Much of the Alleged Nuisance Behavior Did Not Occur On or About the Premises.**

Under R.C.W. 59.12.030(5), when a tenant “erects, suffers, permits, or maintains *on or about the premises* any nuisance” (emphasis added), grounds for eviction may exist, and a three-day notice may provide jurisdiction in an unlawful detainer action. Much of the behavior TRM claimed constituted a nuisance did not occur “on or about the premises.” The verbal threats against Mr. M. occurred in July 2007 at two sites away from the JSA. (Ex. 29, CP 309-310) The verbal threats against Mr. B. occurred in 2006 at a site away from the JSA. (CP 310) Because they were remote in time and place, and not “on or about the premises” these threats could not give rise to a cause of action under R.C.W. 59.12.030(5). All of

the other allegations in the October 9, 2007 notice concern ordinary lease violations. (Ex. 5)

3. **Stewart's Conduct Could Not Amount to Nuisance Because It Did Not Entail Drug-Related Activity, Gang-Related Activity or Result in An Arrest Involving Physical Assaults or Threats with a Deadly Weapon.**

The statutory provision, R.C.W. 59.12.030(5), authorizing the use a three day notice to quit as a jurisdictional prerequisite to an unlawful detainer action if a tenant “erects, suffers, permits, or maintains on or about the premises any nuisance” was included in the original unlawful detainer statute passed in 1890. Laws 1890, c. 73, §3. Prior to 1973, there was no separate Washington statute governing the respective rights and responsibilities of residential tenants and landlords. In 1973 the legislature enacted the Residential Landlord-Tenant Act (“RLTA”) in which “the respective rights and duties of residential tenants and landlords are spelled out in great detail.” *State v. Schwab*, 103 Wn.2d 542, 550, 693 P.2d 108 (1985). The history of the RLTA “shows the care exercised by the Legislature in writing the act and in delineating the specific rights, duties, and remedies of both landlords and tenants.” *Id.*, at 551.

The RLTA codifies tenant duties at R.C.W. 59.18.130. These statutory tenant duties include the duty that the “tenant shall . . . not permit a nuisance or common waste.” R.C.W. 59.18.130(5). Nuisance is not

defined in either R.C.W. 59.12 or R.C.W. 59.18. In a residential tenancies, nuisance applies as a ground for terminating a tenancy and proceeding with an unlawful detainer action only if the tenant has engaged in drug-related activity, gang-related activity or has been arrested for physical assaults or threats with a firearm or other deadly weapon. R.C.W. 59.18.130; R.C.W. 59.18.180.

In 1992 legislation was passed to make it easier for landlords to evict residential tenants who engaged in threatening behavior. “It is the intent of the legislature . . . to provide additional mechanisms to allow landlords to evict tenants who endanger others . . .” 1992 c 38 §1. In order to accomplish this intent, a new tenant duty was added to the enumerated tenant duties at R.C.W. 59.18.130. Under R.C.W. 59.18.130(8) tenants shall:

Not engage in any activity at the rental premises that is: (a) Imminently hazardous to the physical safety of other persons on the premises; and (b)(i) Entails physical assaults upon another person which result in an arrest; or (ii) Entails the unlawful use of a firearm or other deadly weapon as defined in R.C.W. 9A.04.110 which results in an arrest, including threatening another tenant or the landlord with a firearm or other deadly weapon under R.C.W. 59.18.352.

The legislation authorized landlords to proceed directly to unlawful detainer if a tenant is arrested for activity that violates R.C.W.

59.18.130(8) without having to comply with the usual notice and opportunity to cure provisions of R.C.W. 59.18.180. R.C.W. 59.18.180(3). The legislation also added R.C.W. 59.18.352 (allowing tenants to terminate a tenancy if the landlord fails to file an unlawful detainer action against a tenant who threatens another tenant with a firearm or other deadly weapon), R.C.W. 59.18.354 (allowing tenants to terminate tenancy if threatened by the landlord with a firearm or other deadly weapon and the landlord is arrested), and R.C.W. 7.48.155 (requiring arrest before unlawful use of a firearm or other deadly weapon in or adjacent to a dwelling that threatens safety can constitute a nuisance.)

The legislature has passed similar legislation to make it easier for landlords to evict residential tenants who engage in drug-related activity at the premises or gang-related activity at the premises. The 1992 legislation was modeled on 1988 legislation creating a new tenant duty under R.C.W. 59.18.130(6) not to engage in drug-related activity at the premises and providing a similar landlord remedy under R.C.W. 59.18.180(2) allowing the landlord to proceed directly to an unlawful detainer action without having to comply with the usual notice and opportunity to cure provisions of R.C.W. 59.18.180. “The legislature finds that it is beneficial to rental property owners and to the public to permit landlords to quickly and efficiently evict persons who engage in drug-related activities at rented

premises” 1988 c 150 §1. The pattern was subsequently followed in 1998 when the legislature added a tenant duty under R.C.W. 59.18.130(9) not to engage in gang-related activity at the premises and providing a similar landlord remedy under R.C.W. 59.18.180(4) allowing the landlord to proceed directly to an unlawful detainer action without having to comply with the usual notice and opportunity to cure provisions of R.C.W. 59.18.180.

If residential tenants, like Stewart, could have been evicted for nuisance under R.C.W. 59.12.030(5) for verbal threats alone without physical assaults and without threats with a firearm or other deadly weapon, there would have been no need for the 1992 amendments to the RLTA making it easier for landlords to evict tenants who endanger others in this manner. If the legislature intended to allow residential tenants to be evicted under R.C.W. 59.12.030(5) merely by labeling ordinary lease violations as “nuisance,” there would have been no need for the 1988 legislative enactment making it easier to evict for drug-related activity on the premises or for the 1998 legislative enactment making it easier to evict for gang-related activity on the premises.

The RLTA as a whole and R.C.W. 59.18.030 and R.C.W. 59.18.180 in particular are more recent and more specific legislative enactments than R.C.W. 59.12.030(5). Where there is a conflict between

one statutory provision which treats a subject in a general way and another which treats the same subject in a specific manner, the specific statute will prevail. *Pannel v. Thompson*, 91 Wn.2d, 589 P.2d 1235 (1979). The legislature specifically addressed threatening behavior by tenants in the residential landlord-tenant context in 1992. These 1992 amendments discussed above were enacted very soon after the Supreme Court decision in *Terry*. The Legislature is presumed to be aware of judicial interpretations of its statutes. *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995).

Stewart's alleged conduct cannot constitute a nuisance under Washington law because he was not engaged in drug-related activity or gang-related activity and he was not arrested for physical assaults or threats with a firearm or other deadly weapon. TRM alleged that Stewart made verbal threats to other tenants of TRM and caused them to feel intimidated. TRM neither alleged nor offered any evidence that Stewart threatened with a firearm or other deadly weapon or physically assaulted any TRM tenant or was arrested for such activity.

C. TRM's Failure Provide Stewart With a Notice and an Opportunity to Cure Deprived the Court of Unlawful Detainer Subject Matter Jurisdiction.

The court erred in concluding that TRM was not required to provide a notice with an opportunity to cure before proceeding with its

unlawful detainer action against Stewart. (CP 313) The October 9, 2007 notice alleges breaches of lease covenants and/or violations of the statutory duty not to permit nuisance but fails to provide an opportunity to cure as required by R.C.W. 59.12.030(4), R.C.W. 59.18.180 and a *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990).

1. **The October 9, 2007 Notice Alleges Violations of the Lease and of Statutory Tenant Duties For Which Notice and an Opportunity to Cure is Required.**

The jurisdictional condition precedent to the maintenance of an unlawful detainer action for breach of a lease covenant is a ten-day written notice requiring in the alternative the performance of the covenant or surrender of the premises. *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957); *Woodward v. Blanchett*, 36 Wn.2d 27, 216 P.2d 228 (1950). When a landlord alleges a breach of a lease covenant, the proper unlawful detainer notice is a ten day notice to comply or vacate pursuant to R.C.W. 59.12.030(4). *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990).

The tenant must be given at least one opportunity to correct a breach of the lease before a landlord may resort to forfeiture of the lease under the accelerated provisions of RCW 59.12. *Terry*, 114 Wn.2d at 568-69. A notice demanding that a tenant vacate within ten days without

providing an opportunity to cure is insufficient and deprives the court of unlawful detainer jurisdiction. *Id.* A 30-day notice to vacate alleging repeated lease violations even when preceded by numerous informal demands to comply with the lease is insufficient to confer unlawful detainer jurisdiction where there has been no written notice under R.C.W. 59.12.030(4) providing the tenant with the alternative of performing the covenant or surrendering the premises. *Sullivan v. Purvis*, 90 Wn. App. 456, 460, 966 P.2d 912 (1998). As stated by the Court in *Sullivan*:

The law on this issue is well settled. Jurisdiction is statutory. A 10-day alternative to cure lease violations is a jurisdictional condition precedent to an unlawful detainer action for breach. *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957). . . . In an action for unlawful detainer based on a covenant breach, a notice that does not give the tenant the alternative of performing the covenant or surrendering the premises does not comply with the provisions of the statute. And the court has no authority to adjudicate the controversy. *Sowers*, 49 Wn.2d at 894, 307 P.2d 1064; *Kelly v. Schorzman*, 3 Wn.App. 908, 912-13, 478 P.2d 769 (1970).

However, a 30-day notice to vacate alleging not only repeated lease violations but also service of several 10-day comply or vacate notices is sufficient. *Housing Authority v. Silva*, 94 Wn. App. 731, 972 P.2d 952 (1999).

“The Legislature has provided for a tenant to have *at least* one opportunity to correct a breach before forfeiture of the lease under the

accelerated restitution provisions of R.C.W. 59.12.” *Terry*, 114 Wn.2d at 568-69 (emphasis in original). In *Terry*, the unanimous Washington Supreme Court held that the failure to provide a notice with an opportunity to cure an alleged breach of a lease covenant deprives the court of subject matter jurisdiction in an unlawful detainer action. The Housing Authority of Everett brought an unlawful detainer action against Mr. Terry for “creating a threat to the health and safety of other residents.” *Id.* at 560. The Housing Authority had received 12 written complaints against Mr. Terry from other tenants. As a result of a mental disability, Mr. Terry’s behavior was “often disagreeable and his conduct has been, from time to time, unpleasant and intimidating.” The worst of his “unpleasant and intimidating” behavior was directed at his neighbor and included “verbal threats, physical intimidation and destruction of property.” *Id.* at 560-61. On at least one occasion, Mr. Terry tried to run down this neighbor with his car. *Id.* Although the neighbor obtained a series civil protection orders against Mr. Terry, he repeatedly violated them. *Id.*

Overruling the decision of trial court in *Terry*, the Supreme Court held that there is no federal preemption of Washington statutory unlawful detainer notice requirements and that the failure to provide a notice with an opportunity to cure deprived the trial court of unlawful detainer subject matter jurisdiction because the jurisdictional condition precedent of proper

notice was not met. *Id.* at 564-65. The Housing Authority's termination notice alleging these serious lease covenant breaches fully complied with federal law notice requirements applicable to public housing, but did not comply with Washington law by alleging breaches of a lease covenant without providing an opportunity to perform the covenant or condition before requiring surrender of the premises.

Like Mr. Terry, Stewart has behaved at times in a manner that was disagreeable, unpleasant and intimidating. Both Mr. Terry and Stewart engaged in verbal threats and physical intimidation. The Housing Authority of Everett sought to evict Terry because of a perceived threat to health and safety of other residents just as TRM sought to evict Stewart because of a perceived threat to health and safety of other residents.

Mr. Terry attempted run down his neighbor with a car and repeatedly violated civil protection orders obtained by this fearful and intimidated neighbor. There was no evidence that Stewart assaulted or attempted to assault any tenant of TRM, and no evidence that any TRM tenant obtained or attempted to obtain a civil protection order against Stewart. Despite this extremely hostile and intimidating behavior by Mr. Terry, the unanimous Supreme Court held that the Housing Authority could not avoid its obligation to provide a notice that complied with both federal and state law, and that it must fulfill its requirement under state law to

provide a notice with an opportunity to cure before forfeiture of his lease.

2. TRM Failed to Provide a Notice With an Opportunity to Cure to Stewart as Required by R.C.W. 59.18.180

R.C.W. 59.18.180 provides residential tenants with an opportunity to cure alleged violations of statutory duties within 30-days after written notice. R.C.W. 59.18.180 provides landlords with remedies in situations where tenants fail to comply with a statutory duty set forth in “*any* portion of R.C.W. 59.18.130 or 59.18.140” and “such noncompliance can substantially affect the health and safety of the tenant or other tenants. . . .” (emphasis added.) The tenant duties codified at R.C.W. 59.18.130 include the duty not to permit a nuisance or common waste. R.C.W. 59.18.130(5).

RCW 59.18.180(1) requires the tenant to “comply within thirty days after written notice by the landlord specifying the noncompliance or, in the case of an emergency as promptly as conditions require.” *Id.* If the noncompliance is “substantial,” then it “shall constitute a ground to commence an unlawful detainer action under R.C.W. 59.12.” *Id.* However, “the tenant shall have a defense to an unlawful detainer action filed solely on this ground if it is determined at the hearing authorized under the provisions of Chapter 59.12 R.C.W. that the tenant is in substantial compliance . . . or if the tenant remedies the noncomplying condition within the thirty day period.” *Id.*

There are three exceptions to the 30-day notice with an opportunity to cure requirements provided in R.C.W. 59.18.180 under which the compliance provisions of this section do not apply and the landlord may proceed directly to an unlawful detainer action: first, under R.C.W. 59.18.180(2), if drug related activity is alleged to be a basis for termination of tenancy under R.C.W. 59.18.130(6) and 59.12.030(5); second, under R.C.W. 59.18.180(3), if the tenant is arrested for activity on the premises which creates an imminent hazard to physical safety and involves either physical assaults or the unlawful use of a firearm or other deadly weapon; third, under R.C.W. 59.18.180(4), if gang-related activity, as prohibited under R.C.W. 59.18.130(9), is alleged to be the basis for termination of the tenancy.

The allegations against Stewart do not fit within any of the three narrow statutory exceptions to the requirement of an opportunity to cure. Stewart did not engage in any activity at the rental premises that was drug-related, that was gang-related or that resulted in an arrest for unlawful use of a firearm or other deadly weapon or physical assaults, and the Plaintiff does not allege otherwise.

D. TRM Waived Its Right to Declare a Forfeiture By Accepting of Stewart's Tenders of August and September Rent.

TRM waived its right to declare a forfeiture of Stewart's tenancy

for known breaches occurring prior to its acceptance of Stewart's tender of August rent on August 3, 2007. (Ex. 21) TRM further waived its right to declare a forfeiture of Stewart's tenancy for known breaches occurring prior to September 30, 2007 when it accepted Stewart's tender of September rent on October 10, 2007 (Ex. 22)

1. **Under Washington Law, Accepting Rent With Knowledge of a Breach Waives the Right to Declare a Forfeiture or to Commence an Unlawful Detainer Action Based on Such Breach.**

Acceptance of rent waives a landlord's right to forfeit a tenant's lease as a matter of law. This has been the rule in Washington for over a hundred years beginning with *Pettygrove v. Rothschild*, 2 Wash. 6, 25 P. 907 (1891). The common law developed this principle "because it is a contradiction in terms to treat a man as a tenant and then treat him as a trespasser" *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 812, 631 P.2d 923 (1981)(citations omitted). The law does not permit the landlord to terminate the lease while also accepting rent. Acceptance of rent reaffirms and renews the tenancy. "The acceptance of rent eo nomine is ordinarily a recognition of the continuance of the tenancy, and where it is accepted after and with knowledge of the act of forfeiture by the tenant, it is a waiver of the forfeiture." *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 118 P. 329, (1911).

If a landlord accepts rent with knowledge of a breach of the terms of a lease, the right to declare a forfeiture for such breach is waived. *Wilson*, 31 Wn.2d 633. In *Wilson*, the Supreme Court recognized that the waiver doctrine is founded on the principle that the unlawful detainer remedy must be strictly construed in favor of the tenant and against the landlord. 31 Wn.2d 635. The waiver doctrine is also founded on the principle that the law does not favor forfeitures and equity abhors them. *Deming v. Jones*, 173 Wn. 644, 648, 24 P.2d 85 (1933). “Forfeitures are never favored. Equity always leans against them and only decrees in their favor when there is full, clear and strict proof of the legal right thereto.” *Income Properties Investment Corp. v. Trefethen*, 155 Wn. 493, 505, 284 P. 782 (1930). The waiver doctrine avoids forfeiture as a matter of law. *Cuschner v. Westlake*, 43 Wash. 690, 697, 86 P. 948 (1906); *See also, Kaufman Bros. Construction, Inc. v. Olney*, 29 Wn.App. 296, 628 P.2d 838 (1981).

In *Wilson*, the Supreme Court held that the acceptance of rent with knowledge of prior breaches waives not only the right to declare a forfeiture for such prior breaches, but also the right to bring an unlawful detainer action based on such prior breaches:

[W]hen the landlord accepts the rent, with knowledge of prior breaches, thereby waiving his right to declare a forfeiture of the lease because of such prior breaches, he also

waives his right to rely on such prior breaches as a basis for setting in motion his statutory remedy of unlawful detainer.

31 Wn.2d at 644.

Although the acceptance of rent waives the right to declare a forfeiture for prior breaches, it does not operate as a waiver of a continuance of the breaches or of any subsequent breaches. *Id.*, at 640.

The doctrine of waiver has been most commonly applied in the context of lease terminations for non-payment of rent. *See, e.g., Housing Resource Group v. Price*, 92 Wn.App. 394, 958 P.2d 327 (1998); *First Union Management v. Slack*, 36 Wn. App. 849, 79 P.2d 936 (1984); *Stevenson v. Parker*, 25 Wn. App. 639, 608 P.2d 1263 (1980); In *Price*, the court held that a federally-subsidized landlord did not waive its right to evict a tenant by accepting partial rent where landlord applied rent payments to earliest rent obligation first and the tenant still owed past-due amount for period preceding three-day pay or vacate notice. *Id.*, at 402. But the waiver doctrine also applies in situations where a landlord has accepted rent after notifying a tenant that he or she has violated non-monetary provisions of his or her lease. *See, e.g., Signal Oil Co. v. Stebick*, 40 Wn.2d 599, 245 P.2d 217 (1952); *Wilson v. Daniels*, 31 Wn.2d 633.

The waiver doctrine applies to federally-subsidized housing in the same manner as it applies to private housing that is not federally subsidized. *Housing Resource Group v. Price*, 92 Wn.App. 394, 958 P.2d 327 (1998).

The waiver doctrine applies to invalidate the notice of forfeiture as well as to the underlying breach. *Signal Oil v. Stebic*, 40 Wn.2d 599, 245 P.2d 217 (1952). An unlawful detainer notice that refers only to an alleged breach of the terms of the lease that has been waived becomes “a nullity.” *Id.* at 605.

Prior to the issuance of the October 9, 2007 nuisance notice, it is undisputed that TRM had accepted rent from Stewart for every month of his tenancy from January 2006 through August 2007. Each time it accepted rent, TRM waived all known breaches occurring prior to the acceptance of rent.

TRM accepted Stewart’s tender of August rent on August 3, 2007 (CP 310, Ex. 21) thereby waiving any right to declare a forfeiture of Stewart’s tenancy or bring an unlawful detainer action on the basis of any known breaches for any known breaches occurring prior to August 3, 2007. When it accepted Stewart’s tender of August rent, TRM knew about Mr. M.’s allegations that Stewart had twice threatened to beat him up. (CP 310, Ex. 29) When it accepted Stewart’s tender of August rent, TRM was also aware of Ms. B.’s complaints about noise from Stewart’s

TV and/or Radio. (CP 309, Ex. 10) TRM's four 20-day "no cause" termination notices issued on April 9, 2007, June 6, 2007, July 2, 2007, and August 1, 2007 (Ex. 9) indicate that it believed it had sufficient cause to terminate his tenancy even if it was unwilling to state openly the reasons for terminating his tenancy.

TRM's acceptance of Stewart's tender of rent on August 3, 2007 waived all breaches whether known or unknown at the time rent was accepted. *Wilson* recites approvingly the "universal rule" that:

if the landlord accepts rent from his tenant after ***full notice or knowledge*** of a breach of a covenant or condition in his lease for which forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot be asserted for that particular breach ***or any other breach which occurred*** prior to the acceptance of the rent."

31 Wn.2d at 641. (Emphasis added). The emphasized language shows that perfect, complete, or full knowledge of the facts is not required. First, the landlord, by knowledge of any breach and acceptance of rent, waives that breach and all others, whether known or not. Second, the landlord need not have full knowledge of any specific breach, but "full notice or knowledge" of ***a*** breach. *Id.* At 640. Notice is sufficient; actual knowledge is not required.

TRM declined Stewart's tender of September rent on August 31, 2007 (CP 310) and served a summons and complaint for unlawful detainer

dated September 4, 2007 based on the August 1, 2007 “no cause” notice. TRM subsequently abandoned the September unlawful detainer action without filing the case, and served a three-day notice to quit based on a nuisance theory dated October 9, 2007. (Ex. 5)

There is nothing alleged in the October 9, 2007 notice (Ex. 5) that was not known to TRM before the end of September through the tenant complaints or otherwise. When it accepted September rent on October 10, 2007, TRM waived all breaches known before the end of September. The October 9, 2007 notice does not specifically allege the date or time of any alleged lease violation, behavior or occurrence. Instead, it makes vague allegation of violations throughout Stewart’s tenancy since its inception in January 2006. Because there is no specific allegation of any lease violation, behavior or occurrence between October 1, 2007 and October 9, 2007 and because all of the alleged lease violations, behaviors or occurrences prior to October 1, 2007 have been waived by acceptance of rent, there are no allegations that have not been waived and the trial court erred when it declined to dismiss this case.

V. **Conclusion**

The judgment of the trial court should be reversed. The trial court’s Judgment should be vacated and the action dismissed. Stewart

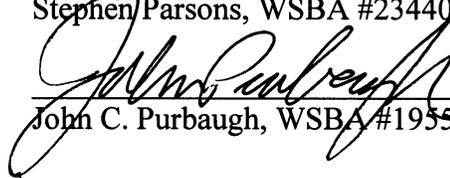
should be restored to possession. 1C WA Prac. 88.43; RAP 12.8.

Dated: November 17, 2008.

James Stewart, by counsel
Northwest Justice Project



Stephen Parsons, WSBA #23440



John C. Purbaugh, WSBA #19559

No. 38109-5

**COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II**

JAMES STEWART

Appellant

vs.

**TACOMA RESCUE MISSION, d/b/a
JEFFERSON SQUARE APARTMENTS**

Respondent

APPENDICES TO BRIEF OF APPELLANT

- | | |
|------------|---|
| APPENDIX A | October 9, 2007 Notice to Quit for Waste, Nuisance of Unlawful Use of Premises (Ex. 5) |
| APPENDIX B | Lease between James Stewart and Tacoma Rescue Mission d/b/a Jefferson Square Apartments beginning January 3, 2006 (Ex. 6) |
| APPENDIX C | 24 C.F.R. §882.511 |

NOTICE TO QUIT FOR
WASTE, NUISANCE, OR UNLAWFUL USE OF PREMISES

TO: JAMES STEWART
2336 South Jefferson Ave., #314
Tacoma, WA 98402

YOU ARE HEREBY NOTIFIED to quit the following described premises: 2336 South Jefferson Ave., #314, Tacoma, WA 98402 and to surrender possession thereof within three (3) days of service of this Notice upon you. The reason for this Notice is: You and/or your guests have interfered with the peaceful enjoyment and use of neighboring tenants property, have engaged in unlawful activities on the premises, and/or you have committed waste on the premises to wit:

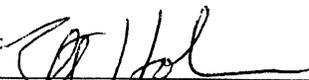
Since January 2006 and continuing to present, you and/or your guests played loud rap music and watched loud, violent movies after 10pm three to four times a week. The building requires that all noise be confined to the resident's apartment by 10pm. On January 1, 2007, you received a Ten-Day Notice to comply due to your loud radio/television; however, you have continued to make excessive noise. The loud noise interferes with the peaceful use and enjoyment of neighboring tenant's property.

Since January 2006, you have repeatedly returned to the building from 1:00am to 4:00am and are loud, by yelling and playing loud music/t.v. and slamming doors, waking your neighbors from sleep. This behavior interferes with the peaceful use and enjoyment of their property.

Four of your neighbors have made official complaints about your threatening and intimidating behavior. You have threatened to assault neighbors who you have accused of flattening your tires on your van. You have also threatened to "knock the crap" out of a neighbor. Several of your neighbors have stated that they are afraid of you because of your threatening behavior. These tenants are not able to move because they are participants in a government program. This type of intimidation interferes with the peaceful use and enjoyment of your neighboring tenant's property.

IN THE EVENT of your failure to vacate said premises within three (3) days of said notice, you will be guilty of unlawful detainer and subject to eviction as provided by law. In such action, the penalties include unpaid rent and damages plus costs and reasonable attorney fees.

DATED this 9th day of October, 2007.

By 
EVERETT HOLUM, P.S.
633 N. Mildred Street, Suite #G
Tacoma, WA 98406
253 471-2141 fax # 253 471-1646

EH: jk
cc: Jefferson Square Apartments, Tacoma Rescue Mission

**LEASE
JEFFERSON SQUARE
AN ALCOHOL AND DRUG FREE COMMUNITY**

COPY

The parties listed below have agreed that the landlord will supply a decent, safe and sanitary dwelling to:

RESIDENT: JAMES STEWART located at 2336 South Jefferson Ave., Tacoma, Washington 98402, (253)272-6828, **Apartment Number: 314** ("premises") in the Jefferson Square Building.

Of the total rent, \$ 191.00 shall be payable by the Housing Authority of the City of Tacoma on behalf of the resident and \$ 218.00 shall be payable by the resident. These two amounts shall be subject to change by reason of changes in the resident's income or extent of exceptional medical or other allowable expenses, in accordance with HUD-established schedules and criteria. Any such change shall be effective as of the date stated in a notification to the resident and landlord.

The parties further agree:

1. **TERMS OF LEASE**

This lease is to begin on JANUARY 3, 2006 and is a lease for the specific term of one year and will terminate on DECEMBER 31, 2006 provided, that if the resident continues in occupancy after the expiration of the term with the written consent of the landlord such shall be on the same terms and conditions as the original lease, and the lease shall continue in effect for the duration of such tenancy, but the total duration of the lease shall in no case extend beyond the remaining term of the Housing Assistance Payment contract between the Tacoma housing authority of the City of Tacoma and the Landlord.

2. **RENT**

Rent is payable in advance on the first day of each month. If this lease is executed on a day other than the first day of the month, the resident and the Housing Authority of the City of Tacoma shall pay the amount of their prorated portions to the end of the month in which this lease commences, and thereafter shall pay each full month's rent in advance as provided.

3. **EVICCTIONS**

Termination's of tenancy under this section shall be in accordance with HUD regulations and requirements for the Section 8 Existing Housing Program. Termination's may result from violation of the lease, including the Jefferson Square occupancy rules.

4. **APPLIANCES**

The Landlord agrees to supply the appliances checked below:

Microwave: X Refrigerator: X
Other: Community Kitchen; Common Laundry

— Appendix B

5. **UTILITIES**

Utilities shall be the responsibility of the Landlord. Utilities include electricity, heat, water, sewer, and garbage collection.

Resident may have a telephone installed in his / her unit. Resident will be responsible for all matters related to that telephone including installation, disconnection, repairs, and all payments for its use and shall pay all amounts charged for such installation, disconnection, repairs and use when due.

6. **RESIDENT'S RESPONSIBILITIES**

- (a) The resident agrees that the use and occupancy of the premises be restricted to the individual listed above as resident.
- (b) The resident agrees to use the premises, its appliances, fixtures and facilities in a reasonable manner and for the purpose for which they are intended. The resident shall not deliberately or negligently destroy or remove any part of the premises or knowingly permit any other person to do so.
- (c) The resident agrees to use the dwelling as her / his residence and not pursue any business on the premises. He / She will not assign or transfer this lease, and will not sublet the dwelling or allow any third parties to use or occupy the premises except strictly in accordance with landlord's rules and regulations and this lease.
- (d) The resident agrees to conduct herself / himself and require others on the premises with her / his consent to conduct themselves lawfully and in a manner that will not disturb her / his neighbor's peaceful enjoyment, or cause or be a nuisance.
- (e) The resident agrees to keep all areas, plumbing fixtures and appliances under her / his control as clean as their condition permits, and to dispose of all waste in a clean and safe manner.
- (f) The resident agrees to notify the landlord promptly of need for repairs to the premises or building and of known unsafe conditions which may lead to damage or injury. The resident agrees to pay reasonable charges for repair of damages to the premises or building or the furnishing and fixtures owned or supplied by the landlord, when such damage was the result of willful or negligent acts of the resident or his / her guests.
- (g) The resident shall not make any alterations, changes, repairs, or remodeling of the premises and equipment without prior written consent of the landlord.
- (h) The resident agrees to notify the landlord of any anticipated absence in excess of seven days. During any such absence, the landlord may enter the dwelling when reasonably necessary.

7. **LANDLORD'S DUTIES**

- (a) The landlord shall maintain the premises and all equipment provided therein, as well as common areas, facilities and equipment provided for the use and benefit of the resident, in compliance with the applicable Housing Quality Standards on the basis of which this lease was approved by The Housing Authority of The City of Tacoma.

- (b) The Landlord shall provide:
- (1) effective water and weather protection;
 - (2) plumbing which conforms to applicable standards and is maintained in good working condition;
 - (3) hot and cold running water furnished to appropriate fixtures;
 - (4) a connection to an approved sewage disposal system;
 - (5) adequate heating facilities;
 - (6) an electrical system which conforms to applicable standards and is maintained in good working order;
 - (7) adequate receptacles for the removal of garbage;
 - (8) safety from fire hazards;
 - (9) that the premises be in a clean and sanitary condition and will maintain all areas under her / his control in a similar condition;
 - (10) doors and windows which are accessible from exterior shall be lockable.
- (c) The landlord shall respond in a reasonable time to calls by the resident for services consistent with above obligations.
- (d) The landlord shall provide maintenance services with respect to common areas, facilities and equipment. These services shall include cleaning, maintenance of lighting and equipment, and removal of snow and ice as conditions may require.
- (e) Extermination services shall be provided by the landlord as conditions may require.
- (f) Repainting shall be provided by the landlord as conditions may require.
- (g) The landlord shall not discriminate against the resident in the provision of services or in any other manner on the grounds of race, color, creed, religion, sex, national origin, sexual preference, age, familial status, marital status, physical or mental handicap.
- (h) The landlord shall notify the Housing Authority promptly if the resident abandons the unit or if an eviction action is initiated against the resident.

8. **PRIVACY**

The resident agrees that the landlord or her / his duly authorized agent will be permitted to enter the premises for the purpose of examining the condition thereof or for making improvements or repairs. Such entry may be made only during reasonable hours, after 24 hour advance notice in writing to the resident of the date, time and purpose. The landlord has the right to enter the premises without prior notice if she / he has reason to believe that any emergency exists which requires such entrance. The landlord must promptly notify the resident in writing of the date, time and purpose of such entry, and of the emergency which necessitated it. The landlord shall not abuse the right of access, nor use it to harass. The resident shall not unreasonably withhold consent.

9. TERMINATION OF TENANCY

- (a) The landlord may not terminate the tenancy during the term of the contract and lease, or refuse to renew a lease with the resident except upon the following grounds:
- (1) violation of any condition or provision set forth in the attached Addendum to lease;
 - (2) serious or repeated violation of the other terms and conditions of the lease;
 - (3) violation of applicable Federal, State, or local law; or
 - (4) other good cause.
- (b) In the event the resident fails to fulfill any provision of its lease agreement or commits any act in violation of this lease agreement, this agreement may be terminated by the landlord, and resident evicted from the premises.
- (c) In the event that, during the term of this lease agreement, the resident by reason of physical or mental impairment is no longer able to maintain the premises in a safe and habitable condition, or to care for her / his physical needs, and fails to make arrangements for someone to aid her / him in maintaining the premises in a safe and habitable condition or care for her / his physical needs, the landlord may terminate this lease agreement.
- (d) In the event the resident fails to occupy the premises for a continuous period of 15 days or more without the written consent of the landlord, the landlord may terminate this lease agreement.
- (e) In the event the resident fails to pay rent as established in Paragraph 3 or fails to make the security deposit payment or payment of other charges, for a period of 10 days or more after due date, the landlord may terminate this lease agreement.
- (f) The landlord must serve written notice of termination of tenancy to the resident which states the date the tenancy shall terminate. Such date must be in accordance with the following:
- When the termination is based on failure to pay rent, the notice cannot be sent until the rent has been late for seven days. The notice must give the resident 72 hrs. to pay the rent. The termination date in the notice must not be less than five working days after the resident's receipt of the notice.
 - When termination is based on serious or repeated violation of the terms and conditions of the lease or on violation of applicable Federal, State or local law, the date of termination must be in accordance with State and local law.
 - When termination is based on other good cause, the date of termination must be no earlier than 30 days after the notice is served on the resident.

The notice of termination must:

- (1) state the date the tenancy shall terminate;
 - (2) state the reasons for such termination with enough specificity to enable the resident to understand the grounds for termination;
 - (3) be served on the resident by sending a prepaid first class properly addressed letter to the resident at the premises.
- (g) Immediately upon termination becoming effective, the resident shall remove herself / himself and her/his property from the premises and surrender possession thereof and the equipment and furnishings therein, in the condition as leased, reasonable wear and tear excepted. All amounts shall immediately become due and payable. If the resident remains in possession after a lawful termination without the landlord's consent, the landlord may initiate a Forcible Entry and Detained (FED) action to evict the resident and may obtain damages as provided by law.
- (h) Provided the parties to this lease agreement agree as set forth in Section 15 (a), the resident may terminate this lease agreement by giving the landlord at least 30 days WRITTEN NOTICE in the; manner specific in said paragraph. In the event the resident vacates the premises prior to the date designated in his / her notice of intent to vacate, he / she shall continue to be responsible for payment of rent until the date designated in his / her notice or until such time as the landlord has effected a rental of said premises, whichever occurs first. In the event of the resident's death, commitment to a hospital, institution, or care facility, the landlord shall waive the 30-day notice requirement, and the residence's obligation to pay rent shall cease when the premises are vacated and the landlord has been notified.
- (i) The resident agrees to leave the premises in a clean and good condition, reasonable wear and tear excepted, and to return the keys to the landlord when she / he vacates.
- (j) In the event the premises shall become vacant or shall be abandoned or deserted by the resident, the landlord may presume that the resident has terminated this lease agreement and may immediately take possession of the premises. Abandonment or desertion shall be defined as apparent removal of substantially all of the resident's effects from the premises.
- (k) All personal property left on the premises after termination of occupancy by notice or otherwise shall be deemed to be abandoned, and the landlord shall have the right to dispose of it in accordance with State law.
- (l) Notwithstanding anything to the contrary set forth in Paragraph (j) above, if the resident abandons the dwelling, the landlord shall make reasonable efforts to rerent it. If the landlord rerents the premises, the agreement (unless already terminated) shall terminate as of the date of the new tenancy. If the landlord fails to make reasonable efforts rerent, or if she / he accepts abandonment as a surrender, this agreement shall terminate as of the date the landlord has notice of abandonment.
- (m) This lease shall terminate upon the date of any termination of the Housing Assistance Payments Contract.

- (n) The landlord may, with the prior approval of the Housing Authority of the City of Tacoma, modify the terms and conditions of the lease form effective at the end of the initial term or a successive term, by serving an appropriate written notice on the resident, together with the offer of a revised lease or an addendum revising the existing lease. This notice and offer must be received by the resident at least 30 days prior to the last date on which the resident has the right to terminate the tenancy without being bound by the modified terms and conditions by giving the landlord written notice in accordance with the lease that she / he intends to terminate the tenancy.
- (o) Notice of Termination may be given by either party to this lease agreement on any day of the month.
- (p) In the event the resident is terminated as a result of a violation by the resident of this lease agreement, the Housing Authority of the City of Tacoma will have no obligation to continue assistance to the resident.

10. **DISCLOSURE**

The landlord's name, address and telephone number is:

Tacoma Rescue Mission
PO BOX 1912, Tacoma, Washington 98401 -1912
(253) 383-4462

The Director of Tenant Housing name, address, and telephone number is:

Elizabeth Jensen
2336 Jefferson Avenue South (Office)
Tacoma, Washington 98402 - 1426
Office (253) 272-6828

- 11. **GOOD FAITH**
Every duty and every act which must be performed under this agreement imposes an obligation of good faith in its performance or enforcement.
- 12. This lease shall not become effective unless the Housing Authority of the City of Tacoma has executed Housing Assistance Payments Contract with the landlord effective by the first day of the term of this lease.
- 13. In the event that THA determines, after having given the resident reasonable notice (with a copy to the landlord) and opportunity to respond, that the resident is ineligible for further housing assistance payments because of failure to comply with the resident's obligations under the Statement of Family responsibility, the Housing Authority of the City of Tacoma shall notify the landlord and the resident of such determination. Such determination shall be grounds for termination of this lease by the landlord.

14. OPTIONAL PROVISIONS

(a) Notwithstanding the written terms of the lease as stated on Page 1, or any renewal / extension of this lease, resident may terminate this agreement within twenty (20) days written notice prior to the end of the month, to the landlord and to the Housing Authority of the City of Tacoma.

Initials of Landlord ES Initials of Resident JMS

(b) The resident certifies that she / he has received a copy of this Agreement and the following Attachments to this Agreement and understands that these Attachments are part of this Agreement.

- 1. Addendum to Jefferson Square Building Lease
- 2. Attachment 2 - Jefferson Square Building Rules

Initials of Landlord ES Initials of Resident JMS

(c) Other must remain in case management while living at Jefferson Square.

Initials of Landlord ES Initials of Resident JMS

15. DEPOSIT

The security deposit is \$200.00 at the time of admission. The landlord acknowledges receipt of \$ 200.00 as a cleaning and security deposit which may be held by the landlord during the tenancy. Not more than fourteen (14) days after the return of the dwelling and keys, the landlord shall deliver to the resident.

- (a) A written statement itemizing all deductions, if any.
- (b) Any balance of the deposit owed to the resident.

The Landlord may deduct unpaid rent and the actual and reasonable cost of repairs due to damage caused by the resident or the resident's guests, except damage caused by normal wear and tear.

This document and its attachments are intended to be a complete record of the rental agreement and supersede, cancel, and replace all promises and agreements made before signing.

Elizabeth Jensen Landlord Agent 1-3-06 Date

James M. Stewart Resident 01/23/00 Date

ORIGINAL
ADDENDUM TO JEFFERSON SQUARE LEASE

DATE:

Jan 23

, 2006

BETWEEN:

TACOMA RESCUE MISSION

"LANDLORD"

AND:

JAMES STEWART

"RESIDENT"

This Addendum to the Jefferson Square Building Lease is hereby attached to and made part of the certain Jefferson Square Building Lease (Section 8 Moderate Rehabilitation Program) dated this same date between Landlord and Resident (Jefferson Square Building Lease). Pursuant to the Jefferson Square Building Lease and this Addendum, Resident is renting certain premises in the Jefferson Square Building, 2336 Jefferson Ave. South, Tacoma, Washington ("Building"), known as Room 314 ("Premises"). In the event any provision in this Addendum is inconsistent with any provision or provisions contained another portions or attachments to the above mentioned Jefferson Square Building Lease, then the provisions of this Addendum shall control. the parties hereby amend and supplement the Jefferson Square Building Lease as follows.

1. Residency Conditioned on Recovery and No Drugs or Alcohol.

Resident acknowledges and agrees that:

- (a) Landlord is operating the Building as an institution providing subsidized housing for persons who are recovering alcoholics and drugs users in conjunction with such person's participation in certain counseling and rehabilitation service programs; and
- (b) The building is intended to be an alcohol and drug free community and the Resident's rights under the Jefferson Square Building lease are conditioned upon Resident's strict compliance with the rules, terms, and conditions set forth in this Addendum, in addition to those imposed upon Resident in the Jefferson Square Building Lease or any other agreement with Landlord or the appropriate counseling service or treatment plan and any other rules and regulations imposed by Landlord with respect to drug or alcohol possession or use.

2. Drug and Alcohol Free Environment

- (a) Resident shall at all times be an active, participating member in a recovery program and shall strictly comply with the requirements of such program.
- (b) Resident shall not bring or cause or allow others to bring any alcoholic beverage or illegal drug or controlled substance into or about the Building or Premises, any room or other part of the Building.

(c)

Resident shall not drink any alcoholic beverage or take illegal drugs either on or off the Building or Premises, nor cause or allow any family member or guest to do so. Landlord and each treatment program counselor reserve the right to require Resident or such other party to submit to an immediate urinalysis and / or breathalyzer to verify whether a breach of this provision has occurred whenever Landlord or such treatment plan counselor deems it appropriate. Failure of Resident or such other person to submit to such urinalysis and / or breathalyzer upon demand shall be a breach of this provision.

3. Resident liable for Conduct of Family Members and Guests.

Resident is responsible for the conduct of each family member and guest of resident on or about the Premises. The restrictions imposed on Resident in this Addendum (other than 2 (a) above) shall also apply to and bind each family member and guest of resident. Breach of any rule, regulation, term or condition of this Lease by any family member or guest of Resident also shall be a breach by Resident of such rule, regulation, term or condition. "Guest" shall include all persons other than the Resident and Resident's family members specifically listed on the first page of the Lease. Guests are allowed in the Jefferson Square Building only during regular visiting hours as established by landlord and the applicable treatment program from time to time and subject to such other rules as Landlord or the applicable treatment program may impose.

4. Immediate termination of Lease and Vacating of Premises.

In the event Resident or, where applicable, any family member or guest of Resident violates any of the above rules, or other rules or regulations imposed upon Resident (or any family member or guest with respect to conduct on or about the Premises or Building) or use regarding drug and / or alcohol possession, the Resident agrees that this lease will terminate and Resident and Resident's family members and guest will leave the Building immediately upon demand from Landlord without further or other notice. Resident acknowledges that failure to do so may subject Resident and such other persons to arrest for criminal trespass.

5. Landlord's remedies not Limited.

Nothing in this Addendum or the Jefferson Square Building Lease shall limit the Landlord's rights and remedies to evict Resident or others to terminate the Jefferson Square Building Lease in other circumstances and landlord reserves the right to refuse any and all such other rights and remedies to the fullest extent permitted by law.

RESIDENT ACKNOWLEDGES THAT RESIDENT HAS READ THE JEFFERSON SQUARE BUILDING LEASE AND THESE ADDENDUM AND UNDERSTANDS THAT HI / HER RIGHTS UNDER THE JEFFERSON SQUARE BUILDING LEASE ARE CONDITIONED UPON STRICT COMPLIANCE WITH THE TERMS OF THIS ADDENDUM AT ALL TIMES. ANY VIOLATION OF THE TERMS, CONDITIONS OR RULES DESCRIBED ABOVE MAY RESULT IN IMMEDIATE TERMINATION OF THE MODEL LEASE AND IN RESIDENT, HIS / HER FAMILY MEMBERS AND GUEST BEING REQUIRED TO IMMEDIATELY VACATE THE PREMISES AND LEAVE THE JEFFERSON SQUARE BUILDING. FAILURE OF RESIDENT, HIS / HER FAMILY MEMBERS AND GUESTS TO DO SO MAY RESULT IN THEIR ARREST FOR CRIMINAL TRESPASS.

LANDLORD:

TACOMA RESCUE MISSION dba: JEFFERSON SQUARE

By: *Elizabeth Jenson*

By: Elizabeth Jenson

Its: Director of Tenant Housing

RESIDENT:

James M. Stewart
JAMES STEWART

January 3, 2006

accordance with the Agreement, the unit(s) will be accepted.

(2) If there are any items of delayed completion which are minor items or which are incomplete because of weather conditions, and in any case which do not preclude or affect occupancy, and all other requirements of the Agreement have been met, the unit(s) must be accepted. An escrow fund determined by the PHA to be sufficient to assure completion for items of delayed completion must be required, as well as a written agreement between the PHA and the Owner, to be included as an exhibit to the Contract, specifying the schedule for completion. If the items are not completed within the agreed time period, the PHA may terminate the Contract or exercise other rights under the Contract.

(3) If other deficiencies exist, the PHA must determine whether and to what extent the deficiencies are correctable, and whether the Contract Rents should be reduced. The Owner must be notified of the PHA's decision. If the corrections required by the PHA are possible, the PHA and the Owner must enter into an agreement for the correction of the deficiencies within a specified time. If the deficiencies are corrected within the agreed period of time, the PHA must accept the unit(s).

(4) Otherwise, the unit(s) may not be accepted, and the Owner must be notified with a statement of the reasons for nonacceptance.

[47 FR 34383, Aug. 9, 1982, as amended at 52 FR 1895, Jan. 15, 1987; 64 FR 50227, Sept. 15, 1999]

§ 882.508 [Reserved]

§ 882.509 Overcrowded and under occupied units.

If the PHA determines that a Contract unit is not decent, safe, and sanitary by reason of increase in Family size, or that a Contract unit is larger than appropriate for the size of the Family in occupancy, housing assistance payments with respect to the unit will not be abated; *However*, the Owner must offer the Family a suitable alternative unit should one be available and the Family will be required to move. If the Owner does not have a suitable available unit, the PHA must assist the

Family in locating other standard housing in the locality within the Family's ability to pay and require the Family to move to such a unit as soon as possible. In no case will a Family be forced to move nor will housing assistance payments under the Contract be terminated unless the Family rejects without good reason the offer of a unit which the PHA judges to be acceptable.

§ 882.510 Adjustment of utility allowance.

The PHA must determine, at least annually, whether an adjustment is required in the Utility Allowance applicable to the dwelling units in the Program, on grounds of changes in utility rates or other change of general applicability to all units in the Program. The PHA may also establish a separate schedule of allowances for each building of 20 or more assisted units, based upon at least one year's actual utility consumption data following rehabilitation under the Program. If the PHA determines that an adjustment should be made in its Schedule of Allowances or if it establishes a separate schedule for a building which will change the allowance, the PHA must then determine the amounts of adjustments to be made in the amount of rent to be paid by affected families and the amount of housing assistance payments and must notify the Owners and Families accordingly. Any adjustment to the Allowance must be implemented no later than at the Family's next reexamination or at lease renewal, whichever is earlier.

[47 FR 34383, Aug. 9, 1982, as amended at 49 FR 19946, May 10, 1984]

§ 882.511 Lease and termination of tenancy.

(a) *Lease*. (1) The lease must include all provisions required by HUD, and must not include any provisions prohibited by HUD.

(2) The lease must provide that drug-related criminal activity engaged in on or near the premises by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control is grounds for the owner to terminate tenancy. In addition, the lease must provide that the owner may

§ 882.512

24 CFR Ch. VIII (4-1-07 Edition)

terminate the tenancy of a family when the owner determines that a household member is illegally using a drug or when the owner determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(b) *Applicability.* The provisions of this section apply to decisions by an Owner to terminate the tenancy of a Family during or at the end of the Family's lease term.

(c) *Grounds for termination of or refusal to renew the lease.* The Owner must not terminate or refuse to renew the lease except upon the following grounds:

- (1) Serious or repeated violation of the terms and conditions of the lease.
- (2) Violation of applicable Federal, State or local law.
- (3) Other good cause.

(d) *Notice of termination of tenancy.* (1) The Owner must serve a written notice of termination of tenancy on the Family which states the date the tenancy shall terminate. Such date must be in accordance with the following:

- (i) When termination is based on failure to pay rent, the date of termination must be not less than five working days after the Family's receipt of the notice.
- (ii) When termination is based on serious or repeated violation of the terms and conditions of the lease or on violation of applicable Federal, State or local law, the date of termination must be in accordance with State and local law.
- (iii) When termination is based on other good cause, the date of termination must be no earlier than 30 days after the notice is served on the Family.

- (2) The notice of termination must:
 - (i) State the reasons for such termination with enough specificity to enable the Family to prepare a defense.
 - (ii) Advise the Family that if a judicial proceeding for eviction is instituted, the tenant may present a defense in that proceeding.
 - (iii) Be served on the Family by sending a prepaid first class properly addressed letter (return receipt requested) to the tenant at the dwelling

unit or by delivering a copy of the notice to the dwelling unit.

(3) *Substitution of State and local requirements.* In the case of failure to pay rent, a notice of termination which is issued pursuant to State or local law or is common practice in the locality and which satisfies paragraph (c)(2) may be substituted for or run concurrently with the notice required herein.

(e) *Eviction.* All evictions must be carried out through judicial process under State and local law. "Eviction" means the dispossession of the Family from the dwelling unit pursuant to State or local court action.

(f) *Lease.* The requirements of this section shall be incorporated into the dwelling lease between the Owner and the Family.

[47 FR 34383, Aug. 9, 1982, as amended at 63 FR 23855, Apr. 30, 1998; 66 FR 28797, May 24, 2001]

~~§ 882.512 Reduction of number of units covered by contract.~~

~~(a) *Limitation on leasing to ineligible Families.* Owners must lease all assisted units under Contract to Eligible Families. Leasing of vacant, assisted units to ineligible tenants is a violation of the Contract and grounds for all available legal remedies, including suspension or debarment from HUD programs and reduction of the number of units under the Contract, as set forth in paragraph (b) of this section. Once the PHA has determined that a violation exists, the PHA must notify HUD of its determination and the suggested remedies. At the direction of HUD, the PHA must take the appropriate action.~~

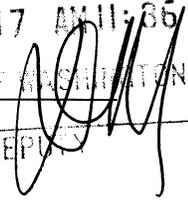
~~(b) *Reduction for failure to lease to Eligible Families.* If, at any time beginning six months after the effective date of the Contract, the Owner fails for a period of six continuous months to have at least 90 percent of the assisted units leased or available for leasing by Eligible Families (because families initially eligible have become ineligible), the PHA may, on at least 30 days' notice, reduce the number of units covered by the Contract. The PHA may reduce the number of units to the number of units actually leased or available for leasing by Eligible Families plus 10 percent (rounded up). If the Owner has only one unit under Contract and if one year has~~

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COURT OF APPEALS
DIVISION II

No. 38109-5

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STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JAMES STEWART

Appellant

vs.

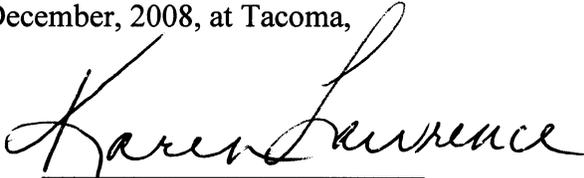
TACOMA RESCUE MISSION, d/b/a
JEFFERSON SQUARE APARTMENTS

Respondent

DECLARATION OF SERVICE OF BRIEF OF APPELLANT

I, Karen Lawrence, declare under penalty of perjury under the laws of the State of Washington, that on November 17, 2008, I delivered a copy of the Brief of Appellant to Everett Holum, attorney for respondent Tacoma Rescue Mission, at the offices of Everett Holum, P.S. at 633 N. Mildred Street, Suite G, Tacoma, WA 98406.

DATED this 17th day of December, 2008, at Tacoma,
Washington.

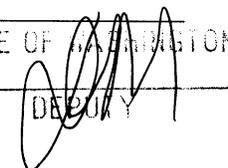

KAREN LAWRENCE

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COURT OF APPEALS
DIVISION II

No. 38109-5

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY 
DEPUTY

JAMES STEWART

Appellant

vs.

TACOMA RESCUE MISSION, d/b/a
JEFFERSON SQUARE APARTMENTS

Respondent

ERRATA TO BRIEF OF APPELLANT

The following errata corrects the table of contents by including page references to the headings and subheadings within Part IV of the Brief, and corrects the numbering of the headings and subheadings within Part IV of the Brief. The corrected table of contents and corrected pages 10, 11, 14, 16, 18, 22, 23, 25, 26, 27, 31, 32, 33, 37, 38, 42, 43, 44 are attached.

DATED this 15th day of December 2008.

NORTHWEST JUSTICE PROJECT



Stephen Parsons, WSBA #23440
Attorney for Respondent