

Mind Your Business – Tia’s Tips for Better Rental Management

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Pandemic Property Sales

The COVID-19 pandemic has sent shockwaves through the community of housing providers and their customers. Many rental owners who may have toyed with the idea of an exit strategy are getting more serious about selling as increasing restrictions and sky-high housing prices are encouraging the sell-off of property portfolios. While some properties are being snapped up by new investors, we’re seeing a big shift in duplex sales to families who want to occupy, not rent. If you’re one of those who is thinking about selling, here’s some food for thought.

The passage of Senate Bill 608 in 2019 changed the reasons housing providers could terminate tenancy. While the law enshrined in ORS 90.427 does continue to allow termination of tenancy for no-cause in the first year, the various moratoria implemented by two executive orders and the passage of House Bills 4213 & 4401, have prohibited this type of termination through at least June 30, 2021. So, without that termination tool in the toolbox buyers, sellers and realtors are having to work with the four Qualifying Landlord Reasons (QLR), all of which require a minimum 90-day written notice.

- 1) The property is being demolished or converted to a different use within a reasonable time.
- 2) The landlord intends to undertake repairs or renovations to the property within a reasonable time and the property will be unsafe or unfit for occupancy during repairs or renovations.
- 3) The landlord intends for the landlord or a member of the landlord’s immediate family to occupy the dwelling unit as a primary residence and the landlord does not own a comparable unit in the same building available that is available for occupancy.
- 4) The landlord is selling the property separately from any other unit to a buyer who intends in good faith to occupy the dwelling unit as their primary residence.

Buying or selling a single-family home

For an owner selling a single-family home occupied by a tenant for longer than one year to a buyer who wants to occupy the home as their primary residence, the law requires that the tenant be provided with a 90-day notice of termination of tenancy. At the time the notice is delivered the landlord must include written evidence of the offer to purchase the unit not more than 120 days after accepting the offer. The sales agreement may state that the buyer intends in good faith to occupy the dwelling unit as a primary residence, but if not, a signed affidavit from the buyer can be included with a copy of the accepted offer.

How is a seller to know if a buyer will want to keep the property as an investment and be willing to take on the existing tenancy, or if they want to purchase the home to occupy as their primary residence? They won’t until they get an offer. If a buyer does want to live in the property and makes an offer, most buyers will need to get a mortgage to purchase, have an interest rate lock that expires in 45 days, and be required to occupy the home within 30 days after closing, so what are buyers and sellers to do? With mortgage rates predicted to stay low, it’s possible that losing a specific rate lock will not be as impactful as it can be at other times. Maybe you work out a deal that delays closing long enough to remove the renter – remember, you have 120 days to work with once the offer is accepted.

For a full cash sale from a buyer who intends to occupy the unit as their primary residence, once the offer is accepted, the seller can provide the tenant(s) with **Notice of Termination-Qualifying Landlord Reason - ORHA form #5A**, check the correct box, provide the evidence of the accepted offer to purchase, and pay the tenant the relocation expense of one-months' periodic rent unless exempt. Owners with an ownership interest in four or fewer residential dwelling units subject to Chapter 90 are exempt from the payment of relocation expenses.

Relocation expenses in the city of Portland are much higher and have few allowable exemptions. Go to <https://www.portland.gov/phb/rental-services/renter-relocation-assistance> for more info.

The notice must be prepared and served in accordance with ORS 90.150, 90.155 & 90.160, and will remain in effect for the purchaser. Even with an all-cash sale, however, the buyer could end up purchasing a huge liability if the seller failed to prepare and serve the notice in accordance with the law. The tenant has the right of due process and could choose to challenge the notice in court. If the buyer proceeds to eviction court, and they have inherited a defective or imperfectly served notice of termination, they could lose the case, maybe have a judgment rendered against them, possibly have to pay the tenant's attorney and start over again.

In a case where a seller believes that it is likely the property would be sold to a buyer who wants to live in the property, and will need to get a mortgage to purchase, the best strategy may be to terminate tenancy for another Qualifying Landlord Reason, such as the owner intends to undertake repairs or renovations to the unit within a reasonable time and the unit will be unsafe or unfit for occupancy during repairs or renovations.

Does your level of renovation qualify?

Realtors encourage sellers to spruce up the unit prior to marketing, but how significant do the repairs or renovations need to be in order to claim the right to terminate for renovation? Sorry to say this but, it depends. We don't have any case law to guide us. You may be challenged and have to justify your decision to a judge, so be prepared to think about this ahead of time. Many repairs or renovations would render a property unsafe or unfit for occupancy, and most contractors will refuse to do substantial work in a unit with tenants in place, but sellers should make sure they can justify the level of work they are doing to prepare to sell. Remember that any renovation must render the unit unsafe or unfit for occupancy.

One attorney I took a class from on this subject said any renovation had better impact habitability, so check out ORS 90.320, the Habitability section of landlord-tenant law. A full interior repaint might qualify on an older home with lead-based paint, but might not, and maybe replacement of flooring, ceiling tiles or texture containing asbestos. Kitchen or bath remodels, would likely render the unit uninhabitable, especially if there's only one bathroom, but things like new windows may not as new windows can be installed from the outside and may not make the property unfit for occupancy during the install, unless there is significant rot requiring structural repair. Re-wiring, re-piping, repairing significant rot in subfloors or walls, replacing cabinets or tub surrounds, tearing open walls to create an open floor plan, these are examples of truly major work that would more than likely pass the 'unsafe or unfit for occupancy' threshold.

Note: Your insurance policy may not provide full coverage for your unit if it is vacant for more than 30 days, so contact your insurance company to learn about insurance options for vacant properties.

The duplex rule

Termination rules do provide a narrow exception for owners with no more than two units on the same tax lot where one unit is their primary residence. The law as written continues to allow termination of tenancy for no-cause with a 60-day notice, **but all no-cause terminations are prohibited through June 30, 2021 under the current moratorium rules.**

In these types of situations, a 30-day notice of termination is allowed if the property is to be sold and the buyer intends in good faith to occupy the tenant's unit as their primary residence. If the buyer does not intend to occupy the tenant's unit as their primary residence, then the tenant comes with the sale. Use ***Notice of Termination – Two-Unit/Owner-Occupied Property – ORHA form #5C.***

If the duplex is being held as an investment property and the seller does not live in one unit, but the buyer wants to occupy one side as their primary residence after closing, the same rules would apply as if for a single-family home. If the tenancy has been in place for more than one year on the side the buyer wants to live in, the seller would either have to issue the 90-day notice of termination for one of the four QLRs allowed by law, or sell the property as-is and the buyer can issue the notice for the qualifying reason of wanting to live in the unit as their primary residence. Once the notice expires and the tenant vacates, the buyer can then move in.

What about tenancies of less than one year?

ORS 90.427(2)(c) states, "Except as provided in subsection (8) of this section, at any time after the first year of occupancy (*emphasis mine*), the landlord may terminate the tenancy only: (A) For a tenant cause and with notice in writing as specified in ORS 86.782 (6)(c), 90.380 (5), 90.392, 90.394, 90.396, 90.398, 90.405, 90.440 or 90.445; or (B) For a qualifying landlord reason for termination and with notice in writing as described in subsections (5) and (6) of this section."

Medford attorney Michael Stout alerted us to this issue which may preclude termination for anything but just-cause termination of tenancy within the first year based on the moratoria restrictions. We have no case law to guide us. Would a judge think that because the other no-cause termination options are off the table that it would be reasonable to allow termination for a QLR? Not sure, and unless you want to be the test case, you may want to change your plans and wait.

Getting the renter's cooperation

I've always recommended to owners wanting to sell that they first offer the property to the renter. Maybe you can carry the note or maybe not, and while it is rare that an offer like this results in a successful purchase, it's not unheard of either. If that's not an option, remember, you can't give a notice of termination simply because you are marketing your property for sale. You must wait until you have an accepted offer from a buyer who intends in good faith to occupy the dwelling unit as their primary residence.

Sellers and their realtors should always consider ways to garner the renter's cooperation in this process, and now more than ever. They're not going to be happy about the situation as it may require them to move out. Many long-term rental owners with long-term renters have kept their rents low, and the renter is likely to experience some amount of sticker shock when they head out to shop for a new home. There is also an extreme lack of available units, making their situation even more bleak.

It's also important to take into consideration renters' pandemic-related worries about exposure to the virus. I've been recommending rental owners reach out to the renters and let them know how the process will go and what steps you will take to reduce the numbers of showings. It might look something like this:

- ✓ The realtor will make an appointment to shoot a detailed walk-through video and take lots of pictures, taking all reasonable COVID-safe precautions by wearing a mask and gloves at all times. The realtor will also have a forehead thermometer with them to provide proof to the renters that they and anyone they show the property to has a normal temperature. (If you expect the unit won't look its best, some realtors or their clients are paying to have someone come over and clean the home or spruce up the landscaping prior to shooting a video or taking pictures, even if that is the renter's responsibility.)
- ✓ Require any interested parties to watch the video, look at the photos and do a drive-by of the unit. Then, make sure they are financially pre-qualified in some fashion in order to actually view the property. That will eliminate the looky-loos and reduce in-person showings to serious buyers only.
- ✓ Provide 'consideration' for each showing (and maybe even for allowing the realtor in to do the video and take pictures). Consideration means money. Perhaps a credit or payment of \$25 per showing or per hour for an open house (not sure if anyone is even doing those right now on occupied properties). I'm not saying \$25 is the magic number, just what seems about right to me.

I also recommend working with the renters to pick one weekday and one weekend day per week that works best for them and doing your best to limit showings to those two days, if possible. Try to understand how disruptive it would be to have strangers tromping through your home, especially with worries about the coronavirus. Their home is their sanctuary, their safe place as yours is to you. You'll have a better chance of garnering their cooperation by being sensitive to that – at least they have some assurance that for five days every week they will be left alone to live their lives.

Let the renters know what the timeline is for termination so they can start planning. Right now, any sale listing is creating a feeding frenzy and many homes are sold well above asking within just a few days. Let them know about the 90-day notice period so they have assurance there will be time to look for and secure new housing.

Entry without notice to show the property

ORS 90.322 states that, "A landlord and tenant may agree that the landlord or the landlord's agent may enter the dwelling unit and the premises without notice at reasonable times for the purpose of showing the premises to a prospective buyer, provided that the agreement:

- (A) Is executed at a time when the landlord is actively engaged in attempts to sell the premises;

- (B) Is reflected in a writing separate from the rental agreement and signed by both parties; and
- (C) Is supported by separate consideration recited in the agreement.”

So, if the renters are willing, you can enter into an agreement for property showing using, ***Entrance Agreement for Property Showing - ORHA form #40***. I imagine very few, if any, renters would be okay with allowing realtors or owners to show a property without notice right now, but it’s worth a try.

Denial of entry

What if, despite all your efforts to gain cooperation, the renter just won’t cooperate? That’s a toughie. While ORS 90.322 specifies that a housing provider has the right of entry after providing a minimum of 24 hours’ notice, it also allows renters to issue a denial of entry if the entry, “...conflicts with their reasonable and specific plans to use the property.” The statute goes on to say that, “A landlord may not abuse the right of access or use it to harass the tenant. A tenant may not unreasonably withhold consent from the landlord to enter.”

To address issues of unreasonable denial of entry, housing providers may serve a ***Notice of Termination with Cause – ORHA form #38***, as allowed by ORS 90.392. I call this notice a 30/14, some folks call it a 14/30. The notice provides the renter with a minimum 14-day cure period to allow entry or the tenancy would terminate within a minimum of 30 days. While that is a long time to wait to enter, once that notice is in place if the renter unreasonably denies entry again within six months of service of the original 30/14, the same statute allows a landlord to serve a ***Repeat Violation Termination Notice – ORHA form #7***, and terminate the tenancy with 10 days’ written notice. The renter has no right to cure this notice.

If you find yourself in this situation, remember, the denial must be unreasonable and you may have to prove that both the original denial of entry and the repeat denial were unreasonable, and that your notice(s) are perfect in every way. That’s why it’s helpful to start with a plan as I’ve outlined above so you have something to show a judge in the event you end up in eviction court. Communications with the renter showing the efforts you made to address any COVID-related concerns and your attempts to be flexible and adapt to their schedule should be helpful in proving their specific denial was unreasonable.

Other issues

Expect there to be delays in the move out, and inform the buyers that just because a notice of termination is served, doesn’t mean that the timing will work out. At least half of the time, there is some delay in the move out – sometimes because the timing for a unit the renters have been approved for isn’t ready, sometimes because they have been unable to find anything. In this scenario, the owner’s only option would be to initiate a case in eviction court, which can take more than a month right now due to pandemic-related court restrictions. I always encourage owners to build in some sort of flexibility to the move out date. If in the end the renter needs more time, if you can, be ready to offer some sort of extension, but only if the renter puts their notice to vacate in writing and pays the prorated rent for the extra time.

If you can’t offer more time, and the renter won’t move out, the owner’s only other option is to initiate an eviction action in court, which takes time, with more time added if there’s substantial abandoned

property to address. If the notice is contested, the process can be delayed further, so owners should factor that into the timing of the notice to vacate. And just to complicate matters even more, remember that tenants may still provide just 30 days' notice to vacate which could throw off the timing as well, although for buyers and sellers that may be less of a concern.

Cash for keys

Cash for keys is a tried and true method for regaining possession of a property and nothing prohibits both parties from making a mutual termination agreement. Just make sure that the terms are clearly spelled out in writing, and that the agreement states what will happen if the tenant complies and what will happen if they don't comply. It's a smart decision to have an attorney draft the agreement and don't hand over the cash until the resident is ready to hand over the keys.

Marketing an investment property

Termination laws do no impact property sales where the seller and buyer are both investors and the buyer won't be living at the property, but there are still issues that can make the property easier or more challenging to market – mostly in regards to the price of rents, the quality of the tenancies, and the completeness of the seller's documentation.

Owners who have under-market rents will find that their properties cannot prove sufficient cash flow to meet the demands of sophisticated investors, and they won't be able to command the same price. If you are planning to sell an investment property in the not-too-distant future, and your rents are below market, plan ahead to increase rents within the limits imposed by ORS 90.323 until your rents are market rate so that your property can command the best sales price. There is no moratorium on rent increases.

The quality of the tenancies can help or hurt investment property sales as well. Residents who are keeping to their lease and caring for the property are a fantastic marketing asset for sellers; problem residents are not. The completeness of the seller's tenancy documents can also help or hurt the sale. If there are gaps or flaws in paperwork, fix them now before you market your property for sale, or be prepared to accept a lower price as a buyer will have to agree to accept the increased liability and correct the deficiencies.

Paperwork pitfalls

What does good paperwork look like? The rental agreement and all addenda are complete, initialed, signed and dated by all adult occupants, the seller has good documentation on the condition of the units on move in, there are accurate tenant ledgers, and good notes and copies of notices regarding lease violations during the tenancy.

Without good paperwork, a buyer may be purchasing liability. For example, the seller is marketing their property built prior to 1978, but has no signed lead-based paint disclosure. The penalty for this violation if reported to the EPA, is \$6000. The buyer could require as part of the sale, that the seller fixes the deficiency in the paperwork so that they are not taking on that kind of liability. Or the buyer could agree to accept responsibility for fixing that problem after the sale, but use that deficiency to negotiate a lower price.

To ensure they are fulfilling their fiduciary duty to their clients, Buyer's Agents should request copies of all leases, addenda, and tenant ledgers and review them for completeness, or have an attorney review them. Also, any existing notices of termination should be reviewed by an attorney or professional consultant to ensure that they will hold up in court if the buyer purchases a property before a notice of termination expires.

I can't stress strongly enough how essential it is that both parties ensure that any notices of termination are prepared and served perfectly. A defective notice of termination can result in a loss in court. For sellers that can mean a lost sale; for buyers it can mean a long delay in being able to occupy the property; and for both it can mean a court judgment against them, payment of attorney fees to the prevailing tenant, and starting the process all over again, ugh.

The takeaway

A property sale with tenants in place requires better advance planning by sellers, more thorough investigation by buyers, and for realtors, it requires a higher level of due diligence than ever before. For realtors, fulfilling your fiduciary duty to your clients means educating yourselves on the mandates of ORS 90.427 and all of its intricacies to provide clients with the best information possible as to the benefits, drawbacks and possible outcomes of selling rental property.

This column offers general suggestions only and is no substitute for professional legal counsel. Please consult an attorney for advice related to your specific situation. This article and the laws referenced therein, are current to the date of publication. Laws and rules change, sometimes with lightning speed, and local law overlays may apply. Proceed with caution.

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