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

By Tia Politi

Overcoming Barriers to Selling a Tenant-Occupied Property

The COVID-19 pandemic and increasing state and local regulations are causing many rental owners who may have toyed with the idea of an exit strategy into getting more serious about selling their rentals. Some are taking the tax hit, but others are using the 1031 exchange process and buying rental properties in less restrictive areas of Oregon or in other states. If you're a landlord who's thinking about selling or a realtor marketing a tenant-occupied property, here's some food for thought.

Tenancy termination

The passage of Senate Bill 608 in 2019 changed how rental owners could terminate tenancy. The law enshrined in **ORS 90.427** does continue to allow termination of tenancy for no-cause in the first year, but after the first year, tenancy termination is limited to for-cause terminations or for one of four Qualifying Landlord Reasons. So, if the tenant is violating the rental agreement or landlord-tenant law – not paying rent, not keeping the unit in a clean condition, disturbing the peaceful enjoyment of neighbors, etc. – you may want to contact an attorney or eviction specialist to check on your options there.

Otherwise, your only other termination option (with one exception) is to terminate for one of four allowable Qualifying Landlord Reasons (QLR), each of which require a minimum 90-day written notice.

1) The property is being demolished or converted to a different use other than residential use within a reasonable time.
2) The landlord intends to undertake repairs or renovations to the property within a reasonable time and the property is unsafe or unfit for occupancy or 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 at the time the notice is delivered.
4) The landlord is selling the dwelling unit separately from any other unit and has accepted an offer within the past 120 days from a buyer who intends in good faith to occupy the dwelling unit as their primary residence.

For reason number four, you cannot serve notice just because you are marketing the unit for sale. You must have an accepted offer from a buyer who intends to occupy the home as their primary residence. Also, the notice must include "written evidence of the accepted offer" to purchase the unit and be served within 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 are you 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? You won't until you get an offer, but rentals generally make ideal starter homes for first-time homebuyers.

If a buyer is purchasing a property for a family member to live in, and the family member is not on title, they must wait until they own the property and may then serve a 90-day notice for that reason.

ORS 90.427(1)(b) "Immediate family" means:

(A) An adult person related by blood, adoption, marriage or domestic partnership, as defined in ORS 106.310, or as defined or described in similar law in another jurisdiction;

(B) An unmarried parent of a joint child;

(C) A child, grandchild, foster child, ward or guardian; or

(D) A child, grandchild, foster child, ward or guardian of any person listed in subparagraph (A) or (B) of this paragraph.

Once an offer is proffered and accepted, the seller can provide the tenant(s) with ***Notice of Termination-Qualifying Landlord Reason - ORHA form #T5***, 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 **ORS Chapter 90** are exempt from the payment of relocation expenses. If required, the relocation payment must be included with the notice. It cannot be issued as a credit, and it does not matter if the tenant owes you money for something else. You must include payment with the notice.

Relocation expenses in the city of Portland are much higher and have few allowable exemptions.
The Portland relocation fee does not have to be paid right away like the state's fee but within 45 days, and Portland landlords may reduce the Portland fee by the amount of the required state fee. Go to https://www.portland.gov/phb/rental-services/renter-relocation-assistance for more info.

The city of Eugene is currently working to implement their own sky-high relocation payments, stay tuned:
https://www.eugene-or.gov/845/Rental-Housing-Code

Any notice of termination must be prepared and served in accordance with **ORS 90.150, 90.155** & **90.160**, and will remain in effect for the purchaser if the sales closes during the term of the notice. The buyer can end up with liability if the seller fails to prepare and serve the notice in accordance with the law. The tenant has the right of due process and can 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. Who will be sued if that happens? Everyone. Get professional assistance.

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 QLR, 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 to claim the right to terminate for renovation? 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. You may be challenged and have to justify your decision to a judge, so be prepared to think about this ahead of time.

A full interior repaint might qualify on an older home with lead-based paint that is substantially peeling, 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. Unless there is significant rot requiring structural repair, or you are increasing or decreasing the size, new windows can be installed from the outside with little disruption. Re-wiring, re-piping, repairing significant rot in subfloors or walls, replacing kitchen cabinets or tub surrounds, tearing open walls to create an open floor plan, abating hazardous materials, these are examples of renovation work that would more than likely pass the 'unsafe or unfit for occupancy' threshold.

Supporting facts
To terminate tenancy for a QLR requires that the landlord provide "supporting facts" regarding the reason for termination. For a property sale to an owner-occ buyer, you must include, "written evidence of the accepted offer." For the renovation option you must describe the work you intend to do that will render the unit "unsafe or unfit to occupy." For example, in 2021, hubby and I gave notice to tenants in a property we wanted to sell that needed substantial renovation. We had dug a new well the year before, but still needed to move our pressure tank to the new well house, dig and place water lines, cap off the old water lines, and hook up to the new well. We also intended to tear out part of a wall, update the bathroom, upgrade some electrical and other plumbing, and of course, do a lot of cosmetic work. We put together a list of those items to include with our notice. In another unit, we had to tear out and rebuild the only bathroom, so even though we were also doing substantial cosmetic work, that's what we listed as our supporting facts, because that's what was going to render the unit uninhabitable.

Some landlords (and one notice I saw from an attorney) quote the statute as their supporting facts, i.e., "We intend to undertake repairs or renovations to the property that will render the unit unsafe or unfit to occupy." I always thought that would not be good enough and one of my colleagues in Salem told me about a case the landlord lost where that's all they had written. The judge said it wasn't enough. They needed to describe the renovations.

If you're hiring a contractor to perform the repairs, they can describe the renovations and you can attach a copy of their bid. If you're doing the work yourself, describe what you're doing that will render the unit unsafe or unfit. Even then, a tenant can sue later if they feel your level of renovation wasn't enough to render the unit unsafe or unfit. One member had a foundation issue in an older home that required a large section of floor to be cut out, so served proper notice. But when the tenant moved and her contractor cut open the living room floor, they found that the foundation repair was less substantial than they had thought. They were able to fix it quickly and the rental owner got the unit back in shape and back on the rental market. The tenant saw that the property was being advertised for rent soon after his move out and is suing. I think she'll be okay because the only way to determine the extent of the repair was to cut out the floor, she has her contractor to testify for her, and she gave the notice in good faith, but we'll see what the judge says when the case is heard.

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. Landlords are allowed to terminate tenancy for no-cause with a 60-day written notice. Also, 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 <u>tenant's</u> 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. For either reason use ***Notice of Termination – Two-Unit/Owner-Occupied Property – ORHA form #T7.*** And just like with a QLR, if you're terminating in 30 days based on a buyer occupying the tenant's unit as their primary residence, you need to include a copy of the accepted offer within 120 days.

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 QLR 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.

A problem with the statute wording
You may notice that the statute – **ORS 90.427(5)(c)** – that allows a landlord to issue the 90-day notice if they are selling the property to an owner-occ buyer says, "…the landlord has accepted an offer to purchase the dwelling unit **separately from any other dwelling unit** from a person who intends in good faith to occupy the dwelling unit as the person's primary residence. So, does that limit a seller's right to terminate tenancy for buyers to occupy one or both sides of a duplex? Or a main house and an ADU?

I don't think so, because later in the same statute – **ORS 90.427(8)(a)(C)(i) –** when referring to the two-unit owner-occupied exemption it uses the same language "the dwelling unit is purchased separately from any other dwelling unit," and because that part of the statute specifically applies to a two-unit property, attached or unattached, to my mind (not legal advice, only lay-person reasoning) it indicates you may serve a notice to terminate for buyers to live in one or both sides. I'm not aware of any case law on this subject, so if you get pushback you may want to get some qualified legal advice before proceeding.

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, sellers and their realtors should always consider ways to garner the renter's cooperation in the process. They're not going to be happy about the situation. Many 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 a lack of available units, making their situation even more bleak.

And while the pandemic seems to be abating, it's still 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 always wearing a mask and gloves, if the renter wants that. The realtor may also want to consider having a forehead thermometer with them to provide proof to the renters that they and anyone they show the property to has a normal temperature. And 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 to schedule a time to 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. I'm not saying $25 is the magic number, just what seems about right to me. Money makes everything better; not perfect, but better.

I also recommend working with the renters to pick one or two weekdays and one weekend day per week that works best for them and doing your best to limit showings to those two or three days, if possible. Try to understand how disruptive it would be to have strangers tromping through your home. 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 four or 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. 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 in part 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 #O13***. I imagine very few, if any, renters would be okay with allowing realtors or owners to show a property without notice, but it's worth asking.

Denial of entry

What if, despite all your efforts to gain cooperation, the renter just won't cooperate? While **ORS 90.322** specifies that a landlord has the right of entry after providing a minimum of 24 hours' notice, it also allows renters to issue a reasonable denial of entry, '"Unreasonable time" refers to a time of day, day of the week or particular time that conflicts with the tenant's reasonable and specific plans to use the premises.' So, if you want to enter at 2:00 p.m. on Saturday, but the tenant has scheduled their child's birthday party at that time, those are reasonable and specific plans to use the premises. 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.” Tenants can assert denial of entry by actual notice (calling you, emailing or texting, etc.) or by posting a note on the entry and you are not allowed to enter.

If the renters won’t cooperate regarding setting specific days for showings, you’ll have to serve a ***24-Hour Notice to Enter – ORHA form #O4*** each time you want to enter. If you have the right listed in your rental agreement, you may email or text your notice to enter. To bolster your case that a specific denial of entry is unreasonable, you may want to include some language like this:

> “We will take any COVID-safe precautions you request. We will only spend as little time in the unit as possible and expect the walk-through will take a maximum of 15-20 minutes. If our requested time and date for entry conflicts with your specific plans to use the property at that time, we will accommodate a different time or day within a 48-hour period following our intended date and time of entry. Please contact us right away to reschedule.”

The way to gain entry after a tenant has unreasonably denied your request is to serve a ***Notice of Termination with Cause – ORHA form #VT5***, 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 they don’t cure you can evict. If they do initially cure the notice and let you in, but unreasonably deny entry again within six months of service of the original 30/14, the same statute allows you to serve a ***Repeat Violation Termination Notice – ORHA form #T1*** 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.

Delayed or accelerated move out

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. 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 agree if the renter puts their notice to vacate in writing to you and pays the prorated rent for the extra time. Use ***Notice of Termination from Tenant – ORHA form #T10.***

If you can’t offer more time, and the renter won’t move out, the only other option is to initiate an eviction action in court, which can take three to five weeks or more. If the termination notice is contested, the process can be delayed further, so everyone should factor that into the timing of the notice to vacate. And remember that even if you serve a 90-day notice, the tenants may instead find something quickly and 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.

What if the sale falls through?
You must rescind the notice and start all over again with a new notice once you receive and accept another offer. If you were required to pay relocation expenses to the tenant, however, you don't need to pay them again.

When to close
If a buyer intends to live in the property and makes an offer, most buyers will need a mortgage to purchase, have an interest rate lock that expires in 45 days, and be required to occupy the home within 30-45 days after closing. With the current volatility in interest rates, buyers who need a mortgage and the sellers hoping to sell, are having a tougher time. If the property sale closes during the notice period, the buyers will be ones tasked with handling the move out and deposit accounting. This can be a big headache if they are not landlords and/or if the seller's property condition reports are shoddy or nonexistent.

Even though it can impact interest rates, buyers might be well advised to wait for the tenants to move out before closing on the sale to avoid the hassles of security deposit reconciliation and maybe even eviction. And, if that's not possible buyers may just have to suck it up and refund the entire deposit if there's no evidence from the seller regarding condition. Just one more thing to think about and plan for.

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. We have a great new form ***Mutual Termination Agreement – Release of All Claim – ORHA form #T9***. Use it to record the terms and if the tenant fails to move out, it can form the basis for an eviction. Whatever amount of money you agree to pay, you may have to provide at least part of the funds up front, so they have money to put down somewhere else. Try to negotiate paying only part of it and specify that they only get the remainder in exchange for possession of the property at the agreed upon time. That way if they don't move out when they agree, you don't have to pay them the rest.

Marketing an investment property
Termination laws do not 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 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.

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. Maybe you should think about removing your problem residents ahead of offering the property for sale. Also,

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, 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 adequate documentation on the condition of the units on move in, copies of work orders, accurate and complete tenant ledgers, good notes and copies of notices regarding lease violations during the tenancy, and detailed inspection reports.

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 $6,000. 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.

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 its intricacies to provide clients with the best information possible as to the benefits, drawbacks, and possible outcomes of selling tenant-occupied 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 herein, 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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