

## Summary Ejectment for Criminal Activity

(As usual, you don't know the rules until you know the grounds.)

Step 1: What are the grounds?

**Breach of a lease condition  
(involving criminal activity)**

OR

**GS Ch. 42, Art. 7: Expedited Eviction  
of Drug Traffickers and Other  
Criminals**



### Breach of a lease condition:

**Step 1: Determine whether the lease contains a forfeiture clause.**

Public housing cases will always have written lease with forfeiture clause.

#### Example:

*The Landlord may terminate this lease for. . .*

*(1) Drug-related criminal activity engaged in, on, or near the premises, by any tenant, household member, or guest, and any such activity engaged in or on the premises by any other person under the tenant's control; . . .*

*2) Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, or that threatens the health of persons residing in the immediate vicinity of the premises.*

**Step 2: Determine whether there has been a breach.**

It is helpful to analyze the facts in light of the following questions:

### Criminal activity by whom?

Activity by a tenant or household member is usually straightforward.

The HUD definition of a *guest* is “a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant.”

A *person under the tenant’s control* is defined as “a person, although not staying as a guest . . . in the unit [who] was at the time of the activity in question on the premises because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant.”

Considerable litigation has focused on what it means to be “under the tenant’s control.” Consider whether person was on premises as result of invitation, or did she “just drop by”? Under the “One Strike” policy endorsed by HUD, a tenant is strictly liable for a person’s conduct while on the premises, if they are there with consent, even if the tenant is not aware of the specifics of the conduct, or could not have reasonably foreseen the conduct.

“Innocent tenant” situation was addressed in cases involving public housing authorities by HUD v. Rucker, 535 U.S. 125 (2002), holding that PHA can elect to evict even if tenant was without fault (overruling a number of cases holding that PHA must demonstrate fault on part of tenant in order to deprive tenant of property interest in leasehold)<sup>1</sup>.

*Note:* Rucker upheld only the PHA’s **right** to elect eviction. Immediately after the case was handed down, the Secretary of HUD sent the following letter to all PHA:

*“I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members. Eviction should be the last option explored, after all others have been exhausted.”*

### What activity is covered?

In the lease provision quoted above, there are several important things to notice about what activity may result in termination.

HUD’s definition of “drug-related criminal activity” is use or possession with intent to sell, distribute or use”. Some courts in other states have interpreted this language as excluding simple possession, but there is significant disagreement within the legal community about which interpretation is correct.

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<sup>1</sup> Rucker applied to public housing authority cases. Whether it also applies to cases brought under Section 8 or other federally-supported housing has been debated, and the answer is not clear. No North Carolina law specifically addresses the issue.

The impetus for including this lease provision in public housing leases was concern about those communities becoming overrun with drug traffickers, and these leases usually contain several provisions addressing the issue of substance abuse by tenants. The inclusion of “other criminal activity” expresses a more limited concern, and it is accordingly more limited. Other criminal activity is a breach of lease condition sufficiently severe to justify eviction only if the activity threatens the health, safety, or right to peaceful enjoyment of other tenants or neighbors. This wording indicates that the landlord must demonstrate more than criminal behavior—there must also be some reasonable basis for concluding that the activity itself threatens others within the scope of protection in one of the specific ways.

Notice that the typical lease provision refers to criminal activity. Federal law does not require that the defendant have been convicted of a crime, or even that the defendant have been charged. The court’s determination of whether the lease provision has been breached is independent of the judicial system’s criminal process. If a particular behavior HAS resulted in a conviction, that finding that the person engaged in that behavior is binding on the small claims magistrate. On the other hand, if a person has been acquitted, the magistrate may still find that the activity occurred, due to the lesser burden of proof applicable in civil court.

Some leases have specific provisions concerning “violent” criminal behavior and do not require that the behavior affect the health, safety, or peaceful enjoyment of the premises. The magistrate must carefully read the specific language to ascertain whether a breach of the lease occurred.

Sometimes a question is raised about whether unlawful behavior is “criminal”, either because the behavior in question is an infraction under state law, or because the behavior results in a juvenile proceeding (which is technically distinct from a “criminal” prosecution). Because there is no law deciding this question, a magistrate is left to a careful consideration of the language of the lease and the behavior in question, in light of the underlying policies for de-criminalizing certain behaviors and favoring, in federally-subsidized housing, increased safety and security for the residents.

#### Where did the behavior occur?

One of the issues present in many cases involves where the activity occurred. In the above lease provision, note that a different rule applies depending on the status of the wrongdoer: drug-related criminal behavior may occur in, on, or near the premises if the person involved is a tenant, household member, or guest, but must occur in or on the premises if the person is a “other person under the tenant’s control.” Other lease provisions may contain language such as “on or off” the premises, applicable to certain types of activity. A determination of whether a lease condition is breached will require consideration not only of WHAT the behavior was, but also WHERE it occurred.

The location of the activity may be important in two other ways. First, behavior that happens away from the rental property may be much less likely to affect the health, safety, and right to peaceful enjoyment of protected persons. Second, as the specific language of the lease provision above indicates, the question of whether an invitee is “under the tenant’s control” becomes much more difficult to demonstrate when that person is away from the rental premises.

#### When did the behavior occur?

Sometimes the timing of the activity is an issue that needs to be considered. Generally, criminal behavior occurring prior to the tenancy will not satisfy the requirement of “threatening the health,

etc.” In some cases, however, a magistrate might find that prior criminal behavior DOES support a finding that the health and safety of the other residents and neighbors are threatened. One example might be the case of a chronic sex offender. Often, the lease will contain specific provisions that may also apply, addressing chronic substance abuse, failure to disclose relevant information in the rental application, or violent behavior.

### **Step 3: Determine whether proper procedure was followed in terminating the lease.**

If the magistrate determines that the lease contains a forfeiture clause prohibiting certain behavior, and that that lease condition has been violated, the next inquiry is whether the landlord followed appropriate procedure in terminating the lease. How will the magistrate know what appropriate procedure is?

In subsidized housing cases the required procedure is required to be set out in the lease. For example, one lease provision required by a particular federal subsidy says:

*The landlord's termination notice shall be accomplished by (1) sending a letter by first class mail, properly stamped and addressed, to the tenant at his/her address at the project, with a proper return address, and (2) serving a copy of said notice on any adult person answering the door at the leased dwelling unit, or if not adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be deemed effective until both notices provided for herein have been accomplished*

This lease contains other provisions concerning the content of the notice of termination, including a requirement that the tenant be advised of his right to meet with the landlord to discuss the proposed termination upon request during the ten days following the notice. The landlord must provide whatever the lease requires, in terms of procedural protections for tenants threatened with eviction, in order to satisfy the requirements for obtaining a judgment awarding possession. Remember that the appellate courts have emphasized that the landlord must demonstrate “*strict compliance*” with procedures set out in the lease as part of making a *prima facie* case.

In subsidized housing cases, HUD regulations are sometimes another source of information for the magistrate about what procedures are required. While these requirements should be incorporated into the lease, there are times when this may not be the case. If an attorney for the tenant attempts to defend on the grounds that proper HUD procedure was not followed, the magistrate should ask for a copy of the relevant regulations and give the landlord an opportunity to respond.

### Domestic Violence

When criminal activity involves domestic violence, an additional federal law comes into play. The Violence Against Women Act (42 USC 1437d) contains specific provisions enacted in response to

the troubling situation created when an act of domestic violence is perpetrated against a public housing tenant on the premises. Prior to this legislation, this criminal activity resulted in eviction of the tenant/victim. In addition to the harm caused to the evicted tenant, this response had a significant chilling effect on the willingness of other potential victims in subsidized housing to call law enforcement for help lest they be evicted as well. Federal law now provides that individuals cannot be evicted for domestic violence perpetrated by others unless the landlord demonstrates that continued tenancy would pose “an actual and imminent threat” to other persons on the property. Landlords have the option of a “bifurcated” lease (similar to NC’s partial eviction), authorizing landlords to evict only the perpetrator. Landlords may require certain specified documentation of the tenant’s status as a domestic violence victim. North Carolina statutes contain similar protections in cases involving victims of domestic violence.

### **Waiver is not a Defense**

Most public housing leases provide that a landlord does not waive the right to seek ejection based on criminal activity by continuing to accept rent. G.S. 157-29(d) goes further and specifies that in North Carolina, whether or not the lease is silent about waiver, no waiver occurs unless the housing authority fails to notify the tenant within 120 days that a violation has occurred or to take steps to seek a remedy for the violation.

### **G.S. Ch. 42, Art. 7: Expedited Eviction of Drug Traffickers and Other Criminals**

North Carolina has its own version of the federal law we’ve been discussing, set out in G.S. 42-59 through -76 (sometimes referred to Article 7 evictions). Because HUD requires leases to contain a forfeiture provision applicable to criminal activity, landlords participating in subsidized housing will generally choose to proceed under breach of a lease condition—federal law is generally more favorable to them. Consequently, Article 7 is more typically relied upon by private landlords—who do not have the protection of a relevant forfeiture clause—confronted with a tenant’s criminal activity. While very similar to federal law, Article 7 contains some important differences.

### **Complete eviction**

#### Grounds:

The landlord must prove one of the following five things to evict the tenant (which includes everyone taking under the tenant):

- Criminal activity occurred on or within the individual rental unit leased to the tenant.  
*Criminal activity is:*
  - conduct that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance);
  - any activity that would constitute conspiracy to violate a drug provision; OR
  - or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by other residents or employees of landlord.

*Individual rental unit* is an apartment or individual dwelling or accommodation that is leased to a particular tenant.

- The individual rental unit was used in any way in furtherance of or to promote criminal activity.
- The tenant, any member of the tenant's household, or any guest of the tenant engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises. *Entire premises* means a house, building, mobile home or apartment that is leased and the entire building or complex of which it is a part, including the streets, sidewalks, and common areas.
- The tenant gave permission to or invited a person to return to or reenter the property after that person was removed and barred from the entire premises. The person could have been barred either by a proceeding under Article 7 of General Statutes Chapter 42 or by reasonable rules of a publicly-assisted landlord.
- The tenant failed to notify a law enforcement officer or the landlord immediately upon learning that a person who was removed and barred from the tenant's individual unit had returned to the tenant's rental unit.

Affirmative defense. The landlord need not prove that the tenant was at fault. However, the tenant may raise and prove such a claim as an affirmative defense to the eviction.

If the landlord proves one of the five grounds for eviction, the tenant may avoid complete eviction by proving that he or she

was not involved in the criminal activity, AND

did not know or have reason to know that criminal activity was taking place or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; **OR**

had done everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

**G.S. 42-64 provides that if tenant establishes an affirmative defense, the court shall refrain from ordering the complete eviction of tenant.**

A second time is harder: A tenant may not successfully use one of these affirmative defenses if the eviction is a second or subsequent proceeding brought against the tenant for criminal activity unless

the tenant can prove by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second instance of criminal activity.

Relief on grounds of injustice. Even if the landlord has proved grounds for eviction, a magistrate may choose not to evict the tenant if, taking into account the circumstances of the criminal activity and the condition of the tenant, the magistrate finds, by clear, cogent, and convincing evidence, that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises.

It is not a defense to an eviction that the criminal activity was an isolated incident or otherwise had not reoccurred or that the person who actually engaged in the criminal activity no longer resides in the tenant's individual unit, but such evidence can be considered if offered to support affirmative defenses or as grounds for the magistrate to choose not to evict the tenant.

Connection between eviction and criminal charges. Just as in the case of breach of lease conditions, discussed earlier, a landlord may pursue an eviction for criminal activity even though no criminal charge has been brought. If criminal charges have been brought, the eviction may go forward before the criminal proceeding is concluded or if the defendant was acquitted or the case dismissed. If a criminal prosecution involving the criminal activity results in a final conviction or adjudication of delinquency, conviction or adjudication is conclusive proof in the eviction proceeding that the criminal activity took place.

Defense of waiver of breach does not apply. G.S.. 42-73 specifically provides that landlord is "entitled to collect rent due and owing with knowledge of any illegal acts that constitute criminal activity without such collection constituting waiver of the alleged defaults."

## **Conditional eviction**

The magistrate may issue against a tenant when the landlord proves that the criminal activity was committed by someone other than the tenant and the magistrate denies eviction of the tenant or the magistrate finds that a member of the tenant's household or the tenant's guest has engaged in criminal activity but that person was not named as a party in the action.

A conditional eviction order does not immediately evict the tenant, but rather provides that as an express condition of the tenancy, the tenant may not give permission to or invite the barred person to return to or reenter any portion of the entire premises. The tenant must acknowledge in writing that he or she understands the terms of the court order and that failure to comply with the court's order will result in the mandatory termination of the tenancy.

A landlord, who believes that a tenant has violated a conditional eviction order, may file a motion in the cause in the original eviction case. That motion shall be heard on an expedited basis and within fifteen days of service of the motion.

At the hearing, the magistrate shall order the immediate eviction of the tenant if the magistrate finds that:

- the tenant has given permission to or invited any person removed or barred from the premises to return to or reenter any portion of the entire premises;
- the tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred has returned to or reentered the tenant's individual rental unit;
- or the tenant has otherwise knowingly violated an express term or condition of any order issued by the court under this statute.

### **Partial eviction**

Magistrate may order removal from a tenant's premises of a person other than the tenant (and not disturb the tenant) when the magistrate finds that person has engaged in criminal activity on or in the immediate vicinity of some portion of the entire premises.

For the magistrate to have jurisdiction to remove a person other than the tenant (and not the tenant), the person to be removed must have been made a party to the action. If name of person is unknown, complaint may name defendant as "John (or Jane) Doe", stating that to be a fictitious name and adding a description to identify him or her.

Any person removed also is barred from returning to or reentering any portion of the entire premises.