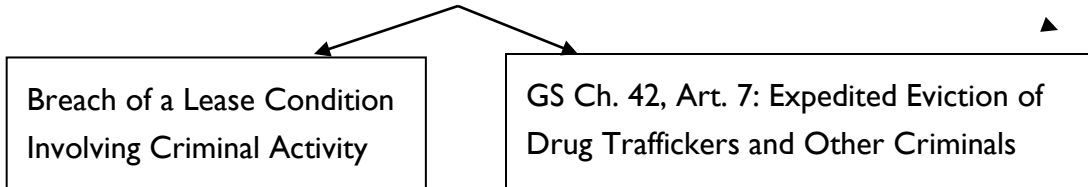




Summary Ejectment for Criminal Activity

Step I: What are the grounds for eviction?



Breach of a lease condition involving criminal activity?

⇒ Check for 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; or*
- (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.*

Questions to ask:

Who? Tenant is clear, and so is household member. A guest is defined by HUD as “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,” on the other hand, 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).

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

Note: 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.

What? 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.

The impetus for including this lease provision in public housing leases was concern about those communities becoming overrun with drug traffickers, and 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 ground for 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—that there must be in addition some reasonable basis for concluding that the activity itself threatens protected others in one of the specific ways.

The law is clear that a conviction is not required, nor is it even necessary that the person in question be 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 there may not be the same requirement that such 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 increased safety in federally-subsidized housing.

Where? 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? 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.

⇒ **Check for strict compliance with procedure required for termination**

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?

- The lease itself will often set out the procedure for terminating a lease. One lease used by HUD-assisted landlords says, for example:

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. Whatever the lease requires, in terms of procedural protections for tenants threatened with eviction, the landlord must provide in order to satisfy the requirements for obtaining a judgment awarding possession.

- The second source of information for the magistrate concerning required procedure are HUD regulations specifying the procedure for termination. While these requirements are often incorporated into the lease, this is not always 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 to be supplied with a copy of the relevant regulations and should give the landlord an opportunity to respond.

If a landlord successfully demonstrates that a breach of the lease condition resulting in forfeiture has occurred, and that proper procedure has been followed in exercising that right of forfeiture, there are two significant additional considerations for the magistrate before deciding on a judgment.

⇒ **Remember VAWA**

The Violence Against Women Act (42 USC 1437d) is a federal law which, among many other provisions, addresses the troubling situation created when an act of domestic violence is perpetrated against a public housing tenant on the premises. In the past, this criminal activity all too often resulted in eviction of the tenant/victim, leaving other potential victims forced to choose between submission to domestic violence or eviction from low income housing. The federal law 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.

⇒ **Common Defenses**

The most common defenses to an eviction for breach of a lease condition based on criminal activity challenge the essential elements a landlord is required to establish. For example, a tenant may establish that the identified conduct did not occur, or was not of the type forbidden by the language in the lease. Particularly in cases involving subsidized housing, in which federal law entitles tenants to specific termination procedures as a matter of due process, a landlord's failure to "strictly comply" with those procedures is a frequent successful defense. See, e.g., Lincoln Terrace Associates v. Kelly, 179 N.C. App. 621 (2006). In Lincoln Terrace, a tenant receiving federally assisted housing was threatened with eviction for criminal behavior by one family member, who damaged property, assaulted another tenant, and disturbed and harassed other tenants, all in violation of a specific lease provision. The lease contained requirements related not only to the giving of notice of termination, but also to the contents of the notice. The property manager testified to having given proper notice, but failed to introduce a copy of the actual notice, preventing the court from verifying that the proper content was included. The Court of Appeals found that the landlord was not entitled to a judgment on these facts, noting: *When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.*

Waiver as a defense?

Most public housing leases provide that a landlord does not waive the right to seek ejectment 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 HUD 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):

- (1) Criminal activity occurred on or within the individual rental unit leased to the tenant.

Criminal activity is:

- a. conduct that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance);
- b. any activity that would constitute conspiracy to violate a drug provision;
- c. 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" means an apartment or individual dwelling or accommodation that is leased to a particular tenant.

- (2) The individual rental unit was used in any way in furtherance of or to promote criminal activity.
- (3) 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.
- (4) 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.
- (5) 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 rely on the absence of fault as an affirmative defense to the eviction. The tenant may avoid complete eviction by proving:

- (1) That the tenant was not involved in the criminal activity **and**
- (2) That the tenant either

- a) 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**
- b) 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 this 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:

- (1) 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;
- (2) 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;
- (3) 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.