

## A Legal View: A Tenant Presents Unique Issues that Must be Considered During an Escrow

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**Q: As a broker representing a seller of a single family home who has been leasing the property, what should I be aware of during the sale transaction and how can I ensure that my client will not have any legal issues with the buyer regarding the tenant?**

**A:** A property that is listed for sale when occupied by one or more tenants presents special issues that must be recognized and addressed during the negotiations with both the buyer and the tenant.

The California Association of Realtors residential purchase agreement ("RPA") provides in paragraph 5-C that with respect to tenant occupied property, the property shall be vacant at least 5 (or other designated days) prior to close of escrow, unless otherwise agreed in writing. If the seller is unable to deliver the property vacant in accordance with rent control or other applicable law, the seller may be in breach of the RPA. Therefore, when representing a seller of property occupied by a tenant, any offer in the form of the standard RPA should be countered with a provision that addresses the terms under which the seller is able to have the property vacant during the escrow if the standard provision cannot be complied with.

The terms under which a seller can agree with a buyer to deliver the property vacant of a tenant will depend upon the terms of the agreement between the seller (as landlord) and the tenant. A tenant is entitled to quiet enjoyment of the property during the term of the lease that can only be terminated pursuant to the terms of the lease and California law. However, the seller can freely transfer ownership of the property so long as the lease by which the tenant occupies the property does not restrict such a transfer.

If the seller agrees to sell property that is subject to a lease term that has not expired and the tenant is performing the contractual duties, any sale is subject to the lease, and the buyer must honor the lease unless a separate agreement is reached with the tenant. In that type of situation, the buyer becomes the new landlord and the rights and obligations of the seller are transferred to the buyer.

A tenant must allow the seller to show the property to prospective or actual purchasers so long as the seller complies with the requirement of giving reasonable notice of at least 24 hours in writing. Mailing of the notice can be used but it may enable the tenant to claim the notice was not received. A better practice would be to telephone the tenant to get permission and then drop off a written notice confirming the time and date of the showing. Typically, the property can be shown only during business hours, unless the tenant gives permission for a weekend showing.

However, if the seller or agent has notified the tenant in writing during the 120 days prior to the notice that the property is for sale and the tenant may be contacted orally to give notice of a showing, the notice of a showing can be given orally. But during the visit, a written notice must be left to inform the tenant of the visit. If the tenant is present and permits the showing, no notice is required.

If the tenant is uncooperative and refuses to permit a showing, the seller cannot disregard the tenant's refusal. But such a refusal may constitute a breach of the lease subjecting the tenant to an eviction and even monetary damages. This is a good example of why a standard lease should always be used because they typically protect the seller's rights to show the property as part of a sale.

Some buyers may require an estoppel certificate regarding the tenancy from the tenant or seller to confirm that there are no tenancy issues that the buyer may become liable for after the sale. A tenant is not required to sign an estoppel certificate unless required by the lease. Therefore, a property owner who expects to sell the property should include a provision requiring the tenant to sign an estoppel certificate in the lease.

If the lease is for a fixed term, such as one year, the tenant is entitled to remain in the property until the end of the term, and if the landlord continues to accept rent thereafter, a month-to-month tenancy is presumed until either the owner or tenant terminates the tenancy with proper notice.

If the tenant does not have the right to remain in the property pursuant to a fixed term lease that has not expired, and has been in the property for less than one year, then a 30 day notice can be used to terminate the tenant's right of possession. However, if the tenant has resided in the property for more than one year, a 60 day notice must be used.

An issue arises upon a sale of a property occupied by a tenant with respect to any security deposit. The seller has the option of returning the deposit to the tenant after deducting any lawful items (such as unpaid rent). Otherwise, the security deposit can be transferred to the buyer minus the lawful deductions and the tenant can be notified of the new owner and the details of the transfer in the form of a statement that must also be provided to the buyer. If the legal procedures are not followed, both the seller and buyer can be jointly and severally liable for the security deposit.

Therefore, when representing a seller of a property occupied by one or more tenants, a review of the written lease, if any, should be made as soon as possible to determine whether the tenant has the right to remain in the property for a fixed term, or whether the tenancy is month-to-month. If the lease is month-to-month, then the appropriate 30 or 60 day notice should be given. The tenant should also be given written notice that the property is for sale and that the tenant may be contacted by telephone to arrange access for showing the property. If the tenant is not current on the rent or has otherwise breached the lease, the appropriate

eviction proceedings should be promptly initiated. Selling a property occupied by a tenant presents unique issues that can result in legal claims and delays in the close of escrow, unless they are recognized and the appropriate remedial measures are utilized in an aggressive fashion.

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