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AUGUST 2020

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RENTAL HOUSING JOURNAL
INSIGHT FOR RENTAL HOUSING PROFESSIONALS

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Between a Rock and a Hard Place

What's a Landlord to Do in These Difficult Times?

By John Triplett

Many landlords have been without clear guidance on how to deal with late rent payments, tenants and laws during the moratoriums around COVID-19.

Rental Housing Journal asked a couple of expert Oregon attorneys recently to weigh in on this question: What is a landlord to do in these difficult times?

The attorneys, Bill Miner, partner-in-charge, with Davis Wright Tremaine in Portland, and David J. Petersen, partner, Tonkon Torp LLP and chair of the Real Estate and Land Use Practice Group, had several suggestions for landlords.

Under the current Oregon moratorium, a landlord cannot terminate a tenancy or threaten to terminate a tenancy for nonpayment of rent due based on Oregon law under HB 4213. So far, the moratorium has been extended to September 30.

Landlords so far have avoided being stuck between "a rock and a hard place" Petersen said, "because there's both a moratorium on evictions for nonpayment of rent and a moratorium on foreclosure for nonpayment of mortgages, and they both expire September 30. But unless tenants can start paying rent on October 1 (including back rent), or the foreclosure moratorium is extended, then landlords will be between a rock and a hard place at that time."

"So for landlords and tenants both, and for their attorneys for that matter, we're all kind of just in a holding pattern," Petersen said. "Many tenants are not paying the rent. But many landlords are not paying their mortgages. And nobody can really do anything about it, but come October 1, assuming that the legislature or the governor do not act to do something to extend it or change it, as long as those two things move in lockstep with each other, then it's not so bad."

During this difficult time, Miner added, "I think you could probably ask 20 different landlords on the best tactics, and you'll get 20 different answers.

See 'What's' on Page 14

4 Signs That Your Gutters Need Cleaning

Keepe

With the fall leaf season fast approaching, we have been receiving calls from single-family and multifamily rental homeowners concerned about overflowing gutters. The majority of these calls are coming from the Pacific Northwest, including Seattle and Portland.

Here are four signs that your gutters need cleaning, and several tips on how to properly accomplish the task before fall.

1. Rainwater is overflowing

One of the major reasons to have gutters is to drain water from the roof and channel it away from the foundation. This also helps prevent your roof from holding excessive moisture that could lead to the rotting of its wooden parts.

See 'Do' on Page 8

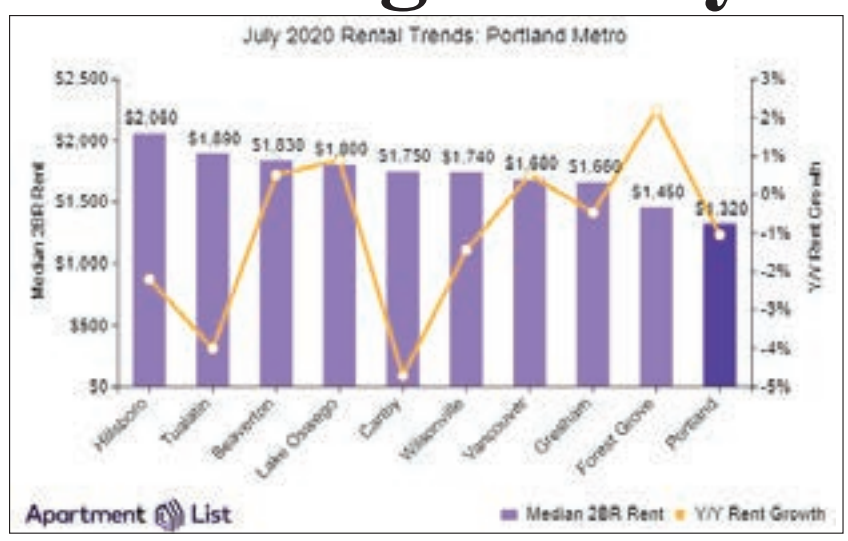
Portland Rents Holding Steady

Apartment List

Portland rents have remained steady over the past month, but are down moderately by 1.1 percent year-over-year, according to the latest report from Apartment List.

Median rents in Portland are $1,119 for a one-bedroom apartment and $1,320 for a two-bedroom. Portland proper has the least expensive rents in the Portland metro.

Rent prices have been decreasing not just in Portland over the past year, but across the entire metro. Of the largest 10 cities in the Portland metro for which Apartment List has data, six have seen prices drop.



Here's a look at how rents compare across some of the largest cities in the metro.

- Over the past year, Canby has seen the biggest rent drop in the metro, with a decline of 4.7 percent. Median two-bedrooms there cost $1,745, while one-bedrooms go for $1,479.
- Forest Grove has seen the fastest rent growth in the metro, with a year-over-year increase of 2.2 percent. The median two-bedroom there costs $1,453, while one-bedrooms go for $1,232.
- Hillsboro has the most expensive rents of the largest cities in the Portland metro, with a two-bedroom median of $2,056; rents grew 0.1 percent over the past month but fell 2.2 percent over the past year.

See Additional Charts on Page 11

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Grateful to be Debt-Free: Kay Properties Helps a Client Stay Debt-Free in their $1M 1031 Exchange into DST Properties for Sale

By the Kay Properties and Investments, LLC Team

Kay Properties is proud to announce the successful completion of five debt-free DST purchases for a couple selling a single-family home in Southern California. They were excited to be able to defer the accumulated capital gains and depreciation recapture taxes that they have accumulated over the many years of owning and managing the property by utilizing Internal Revenue Code, Section 1031. In addition to deferring the taxes by successfully utilizing the 1031 exchange, the clients were grateful to invest and diversify into more passive real estate investments by utilizing the Kay Properties 1031 DST marketplace at www.kpi1031.com.

The Delaware Statutory Trust exchange investments were completed by Kay Properties and Investments team members Chay Lapin, Senior Vice President, and Matt McFarland, Associate.

Chay Lapin, Senior Vice President, stated, "Over a period of approximately 6 months, we helped educate the clients on the potential pros and cons of real estate, 1031 exchanges and DST structured investments. Through ongoing dialogue and correspondence, the clients decided that they wanted to remain debt-free and take a conservative position in their DST 1031 investments. By the time their single-family investment property sold and they officially entered into a 1031 exchange, we were able to work with them to select 5 different debt free DST properties, diversified across five states and across 4 different asset classes."

Matt McFarland, Associate at Kay Properties, stated, "After successfully completing their DST 1031 investment purchases, the clients informed me that they were confident with their purchases and diversification profile of their 1031 DST portfolio as we head into an ever-changing and uncertain future."

About Kay Properties and www.kpi1031.com

Kay Properties is a national Delaware Statutory Trust (DST) investment firm. The www.kpi1031.com platform provides access to the marketplace of DSTs from over 25 different sponsor companies, custom DSTs only available to Kay clients, independent advice on DST sponsor companies, full due diligence and vetting on each DST (typically 20-40 DSTs) and a DST secondary market. Kay Properties team members collectively have over 115 years of real estate experience, are licensed in all 50 states, and have participated in over $15 billion of DST 1031 investments.

**Diversification does not guarantee profits or protect against losses.*

**This case study may not be representative of the experience of other clients. Past performance does not guarantee or indicate the likelihood of future results. Please speak with your attorney and CPA before considering an investment.*

This material does not constitute an offer to sell nor a solicitation of an offer to buy any security. Such offers can be made only by the confidential Private Placement Memorandum (the "Memorandum"). Please read the entire Memorandum paying special attention to the risk section prior to investing. IRC Section 1031, IRC Section 1033 and IRC Section 721 are complex tax codes therefore you should consult your tax or legal professional for details regarding your situation. There are material risks associated with investing in real estate securities including illiquidity, vacancies, general market conditions and competition, lack of operating history, interest rate risks, general risks of owning/operating commercial and multifamily properties, financing risks, potential adverse tax consequences, general economic risks, development risks and long hold periods. There is a risk of loss of the entire investment principal. Past performance is not a guarantee of future results. Potential cash flow, potential returns and potential appreciation are not guaranteed. Securities offered through WealthForge Securities, LLC. Member FINRA/SIPC. Kay Properties and Investments, LLC and WealthForge Securities, LLC are separate entities.

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Sponsored Content

Equality through Transparency: Protecting Yourself

By Robert Collier

I think most people agree that equality is important and should be the norm. Equality needs to be the foundation upon which all decisions are made.

Unfortunately, some landlords do discriminate against rental applicants based on their prejudices whether that be race, color, national origin, religion, sex, familial status, disability, and sexual orientation. However, even when a landlord is honest and does not discriminate against an applicant, the applicant may suspect and claim discrimination if their application is declined.

This misunderstanding can happen because the rental application process lacks adequate transparency.

Technology enables greater transparency by allowing property managers *and* applicants to view the applicant's credit, criminal, and eviction reports while providing a process to challenge inaccuracies. However, new laws are limiting a landlord's ability to use these three standard reports in their decision. This limitation of analyzing the applicant's risk profile increases the importance of and need for landlord references.

Landlord references have always been important, and some would argue that they provide the most valuable and revealing information. The problem is that landlord references are frequently shared verbally and/or privately with little to no transparency or accountability. This opens the "legal door" for applicants to accuse property managers of discrimination when declining their application thereby forcing property managers to spend lots of time and money in court fighting a false but difficult-to-prove claim.

Equality is best ensured through transparency.

By enabling an applicant to view everything a landlord reviews in making their rental application decision, the applicant can validate the information, challenge any inaccuracies, and truly know that their true rental performance and associated risk is being evaluated. With valid transparency, landlords may be able to adjust the terms of the lease to safely accommodate the applicant's true risk.

Our service, Landlord-Reference.com, was created for both renters and property managers to enable transparency and ensure equality.

Property Managers can finally prove no discrimination and eliminate frivolous and expensive lawsuits and Renters can finally know what is being said about them through our service's functionality including:

1. A renter can view and approve or challenge the accuracy of each landlord reference
2. Renters are granted a level of control to virtually eliminate landlord reference related lawsuits
3. Property managers can upload photos and documents to provide additional support for their factual and objective landlord reference
4. Renters can upload photos and documents to provide additional support for their challenge to the accuracy of their report
5. Renters can pre-gather their landlord references in preparation for their rental search
6. The identity of every renter and every landlord/property manager is verified (using our ID verification partner) before creating an account or creating or purchasing a landlord reference.

Landlord-Reference.com is free to join and all functionality is currently free.

Join us, protect yourself from lawsuits, and finally prove that you and your business fully support equality!

Robert Collier is CEO of Landlord-Reference.com. For more information, please email rcollier@landlord-reference.com. More detail is available via a training video on YouTube: https://youtu.be/aa4x6Ud5yRo.

Court: Landlord 'in a Pickle' Must Pay Tenant Allergic to Neighbor's Support Dog

Rental Housing Journal

A court has ruled that a landlord caught in a "pickle" must pay a tenant with dog allergies the value of one month's rent because a nearby apartment was leased to another tenant with an emotional-support dog, according to *The Gazette,* in Cedar Rapids, Iowa.

The apartment building had a no-pet policy, but the landlord made an accommodation required under Fair Housing rules for the tenant with the emotional-support dog.

After years of litigation, In a 4-3 decision, the Iowa Supreme Court overturned a district court ruling that concluded the landlord, 2800-1 LLC, shouldn't have allowed the tenant to have a dog because of the other tenant's pet allergies; the lower court then dismissed the case because the law governing accommodations for emotional-support animals wasn't clear, *The Gazette* newspaper said.

Iowa Supreme Court Chief Justice Susan Christensen, who wrote for the majority, said the two tenants — Karen Cohen, who had severe allergies, and David Clark, who had the dog — had the landlord in a "pickle" trying to accommodate both of them.

However, the landlord, who isn't identified by name in the ruling, should have denied the dog request because Cohen lived there first and the dog posed a direct threat to her health.

Christensen pointed out that this ruling is based on the specific facts of this case.

"Our balancing in this case is not a one-size-fits-all test that will create the same result under different circumstances, such as when the animal at issue is a service animal for a visually disabled person," Christensen told the newspaper.

The court concluded that Cohen, who suffered allergic attacks, was entitled to her claims of breach of lease and breach of the "covenant of quiet enjoyment."

The ruling shows Cohen has a "medically documented severe allergy" to pet dander that causes nasal congestion, swollen sinuses and excess coughing. Her allergic reaction is more severe when exposed to cats, requiring her to carry an epinephrine auto-injectable device to protect against anaphylactic shock.

She needed an apartment that didn't allow pets and signed a lease from 2800-1 LLC on Nov. 11, 2015 for the term of July 2016 to July 2017. Cohen relied on the lease that stated no pets were allowed in the building.

On Jan. 18, 2016, Clark signed a lease to rent an apartment down the hall from Cohen during the same lease period, according to the ruling. Clark's lease also included the no-pet provision.

On or around Aug. 23, 2016, Clark gave the landlord a letter from his psychiatrist that explained he had an "impairment in his ability to function." The psychiatrist asked the landlord to allow Clark to have a dog to benefit his "health and well-being."

The leasing and property manager notified other tenants in the building to see if anyone had allergies to dogs, according to the ruling. Cohen responded, detailing her allergies to dogs and cats.

The property manager then contacted the Iowa Civil Rights Commission and requested a formal agency determination, even though nobody had filed a complaint, the ruling states. The commission employee said the property manager and landlord should accommodate Clark and Cohen, instead of denying the request for the emotional support dog.

There was no formal finding by the commission regarding this situation, according to the ruling.

The Davis Brown law firm writes on https://www.jdsupra.com/legalnews/conflict-over-emotional-support-animals-36699/ that "The court noted that the first-in-time factor 'tipped the balance' in Cohen's favor." The court also explained that the first-in-time factor aligned with those of other courts that have rejected requested changes to a residential complex's contract when those changes interfere with the rights of third parties.

"The takeaway: Landlords can and should consider this first-in-time principle in their analysis of accommodation requests where the well-being of two tenants conflict with one another. Though, landlords must remember the first-in-time principle is only one factor in their analysis," the Davis Brown firm writes.

The landlord allowed the dog and assigned Cohen and Clark to use separate stairwells to keep Cohen free from pet dander, according to the ruling. The landlord also bought an air purifier for Cohen's apartment.

The yearlong efforts were insufficient to prevent Cohen from having allergic reactions to the dog, and she had to limit the time she spent in her apartment. Cohen said she felt as if she had a permanent cold.

Then Cohen filed a small-claims action against the landlord for one month's rent as damages. After a hearing, the court dismissed Cohen's case, concluding the landlord made reasonable accommodations of both Clark's and Cohen's needs. There was no breach of contract of quiet enjoyment.

Cohen appealed to the district court, which concluded that the landlord made sufficient efforts that would justify denying Clark's request, and dismissed Cohen's claims because the law was unclear. The Iowa Supreme Court then overturned that decision.

Do Your Gutters Indicate They May Need Cleaning?

Continued from Page 1

However, when your gutter is filled with debris or wooden particles, it becomes difficult for it to control the water and even channel it away from your property.

2. Presence of algae and debris

Algae, debris, and dirt are most likely to find their way to your gutter one way or the other.

If you notice the presence of birds and critters, you may want to check if there is debris in your gutter.

Failure to clean your gutter of algae and debris may lead to mold growth, which can damage the exterior area of your home.

3. Stagnant water around the foundation

Your foundation is the anchor that holds your home to the ground and prevents moisture or even flood water from getting in.

But a clogged gutter can cause severe damage to your foundation if not cleaned properly and early.

If you notice a pool of standing water around your foundation, it could be caused by gutters not working property.

4. Stains on your siding

If you notice any form of stains or streaks on your siding, it may be time to get your gutters checked and cleaned.

This is because when your gutter is clogged with debris and leaves, water is not able to flow properly, causing it to seep into the siding.

Conclusion

Should you hire a professional to clean your gutter amid the COVID-19 pandemic?

While you may be able to handle minor gutter cleaning, you should consider hiring a professional company to handle bigger jobs.

This will help you get the job done on time and correctly the first time.

Most importantly, with the coronavirus pandemic and social distancing ruled, a professional will adhere to local health rules. Our professionals do not need to set foot inside your property to handle gutter cleaning.

Keepe is an on-demand maintenance solution for property managers and independent landlords. The company makes a network of hundreds of independent contractors and handymen available for maintenance projects at rental properties. Keepe is available in the Greater Seattle area, Greater Phoenix area, San Francisco Bay area, Portland, San Diego and is coming soon to an area near you. Learn more about Keepe at https://www.keepe.com.

Rental-Housing Industry in for More Pain Ahead

Rental Housing Journal

With the pandemic continuing to spread and additional federal funds to help uncertain, the second half of the year could mean pain ahead for rental housing and a challenging time for apartments, Yardi Matrix says.

Rents are falling as COVID-19 weighs on the multifamily rental housing industry, and "more pain" is coming, the Summer Multifamily Outlook says.

While the pandemic ended the long run of multifamily rent growth, expectations of widespread non-payment of rent did not materialize immediately. Federal unemployment and stimulus payments helped tenants make rent payments. The second half of the year, however, is more of an unknown.

Some summary points Yardi Matrix makes in the summer multifamily outlook report:

- Tenants were subsidized by emergency unemployment aid, which ended in July with an unknown future. At the same time, initial hopes for a "V-shaped" recovery were too optimistic, and the effects of the pandemic will linger until the population is confident about health measures.
- Rents turned negative in the second quarter for the first time since the aftermath of the global financial crisis. Property owners concerned with maintaining occupancy renewed leases with no rent increases. New luxury units are taking longer to lease up, as demand is concentrated on less expensive product. Rents are likely to drop further in the second half of 2020 before rebounding in 2021.
- Multifamily capital remains abundant, but deal flow has slowed as underwriting future growth has become more difficult. Fannie Mae and Freddie Mac remain active, though with more conservative terms and higher reserve requirements. Investment activity dropped sharply, but opportunistic capital is circling, waiting for signs of distressed assets.
- The pandemic will weaken the supply pipeline and delay projects that have not yet started construction.

"The rent situation is uneven at the metro level. Those that have had the largest decreases in rent growth include large coastal markets such as New York, Los Angeles, San Francisco and Silicon Valley, where rents were extremely high to begin with. Some residents are leaving (temporarily, for now) to avoid crowds and to get more space," the report says.

MULTIFAMILY NW

The Association Promoting Quality Rental Housing

FORM OF THE MONTH

Emergency COVID-19 Balance Reminder M176 OR

MULTIFAMILY NW
The Association Promoting Quality Rental Housing

OREGON
EMERGENCY COVID-19 BALANCE REMINDER (NOT A BILL OR INVOICE)

DATE _____ PROPERTY NAME / NUMBER _____

RESIDENT NAME(S) _____

UNIT NUMBER _____ STREET ADDRESS _____

CITY _____ STATE _____ ZIP _____

We recognize that the COVID-19 health crisis is severely straining many of our residents' finances. Our goal is to keep residents safely in their homes. If you've had a significant reduction of income due to COVID-19, which is affecting your ability to pay, and have not already made payment arrangements, please contact the Owner/Agent using the contact information below.

This is not a bill or an invoice. This is not an attempt to collect a debt. Eviction for nonpayment is not allowed before September 30, 2020. However, the following amount(s) are past due and outstanding on your account:

CHARGE	AMOUNT	DATE/DESCRIPTION
☐ Rent	$	
☐ Pet rent	$	
☐ Garage	$	
☐ Parking	$	
☐ Storage	$	
☐ Utilities	$	
☐ NSF fees	$	
☐ Noncompliance fees	$	
☐ Deposit(s)	$	
☐ Resident-caused damages	$	
☐	$	
☐	$	
TOTAL	$	

ADDITIONAL INFORMATION:

OWNER/AGENT X _____

ADDRESS _____

TELEPHONE _____

EMAIL _____

☐ ON SITE ☐ RESIDENT ☐ MAIN OFFICE (IF REQUIRED)

The Emergency Period of Oregon's Eviction Moratorium is set to expire after September 30th. The M176 OR Emergency COVID-19 Balance Reminder form is FREE to use in the meantime, a great strategy to keep residents updated of any unpaid rent or monies carrying over during the moratorium.

Multifamily NW Schedule

AUGUST 5

WEBINAR: LEASING ONLINE WITH CONFIDENCE — 10:00 AM - 12:00 PM

WEBINAR: AUGUST LANDLORD STUDY HALL — 6:30 PM - 8:00 PM

AUGUST 7

WEBINAR: SPECTRUM SUPPLIER BOOTH Q&A ROUNDTABLE — 10:00 AM - 11:00 AM

AUGUST 10

WEBINAR: LANDLORD TENANT LAW 1, PART B — 10:00 AM - 12:00 PM

AUGUST 11

WEBINAR: FAIR CITY OF PORTLAND *UPDATE* — 10:00 AM - 11:00 AM

WEBINAR: WORKING AND LIVING DURING A PANDEMIC — 1:00 PM - 2:00 PM

AUGUST 12

APARTMENT ONSITE TEAMS DAY — 12:00 AM - 12:00 AM

WEBINAR: HR ISSUES - GENERATIONAL CONSIDERATIONS — 12:00 PM - 1:00 PM

AUGUST 14

WEBINAR: IT'S THE LAW: TENANTS GONE, NOW WHAT — 12:00 PM - 1:00 PM

AUGUST 17

WEBINAR: LANDLORD TENANT LAW 2, PART A — 10:00 AM - 12:00 PM

AUGUST 18

WEBINAR: FAIR CITY OF PORTLAND - APPLICATIONS AND SCREENING — 10:00 AM - 11:30 AM

WEBINAR: WA IT'S THE LAW — 12:00 PM - 1:00 PM

AUGUST 19

WEBINAR: UTILITY BILLING WORKSHOP — 10:00 AM - 11:00 AM

AUGUST 20

WEBINAR: FAIR CITY OF PORTLAND - SECURITY DEPOSITS — 10:00 AM - 11:30 AM

AUGUST 21

WEBINAR: INDOOR AIR QUALITY — 10:00 AM - 11:00 AM

AUGUST 24

WEBINAR: LANDLORD TENANT LAW 2, PART B — 10:00 AM - 12:00 PM

AUGUST 25

WEBINAR: EVICTIONS POST COVID-19 AND HB4213 — 10:00 AM - 12:00 PM

AUGUST 31

WEBINAR: ADVANCED LANDLORD/TENANT LAW — 10:00 AM - 12:00 PM

SEPTEMBER 9

WEBINAR: HR ISSUES - EMPLOYEE ENGAGEMENT — 12:00 PM - 1:00 PM

SEPTEMBER 14-18

SPECTRUM ROCKS VIRTUAL CONFERENCE

Landlord Rights and Remedies After HB 4213: A Path Forward

By Bradley S. Kraus

Throughout the COVID-19 pandemic, many inquiries I received from clients can be summarized in one question: "What can I do now?"

For many months, a holding pattern existed, as available options were non-existent, or courts were simply turning matters away even when a remedy did exist.

As the calendar turned and June gave way to July, I waited to see what the Oregon Legislature would do with regard to landlord/tenant law during the special session. After months of relying on Gov. Kate Brown's executive orders, the legislature crafted House Bill 4213.

While far from perfect, HB 4213 provides a path forward for some landlords. One road opened by HB 4213 is the ability to act on pre-COVID-19 rent defaults. HB 4213 revolves around the "emergency period," a timeframe defined as April 1, 2020 through September 30, 2020.

If a tenant has not paid monies that were due prior to the emergency period, landlords now potentially have a path forward related to those amounts. This requires a bit more nuance and analysis, due to HB 4213's definitions and payment application; landlords are encouraged to contact their attorneys to discuss those amounts.

Another loophole closed by HB 4213 is the ability to file eviction actions on a tenant's no-cause notice of termination. Gov. Brown's executive order swept up the entirety of ORS 90.427 in its prohibitions. That statute includes both landlord's and tenant's no-cause notices.

This left many landlords with tenants holding over simply because nothing could be done to force them to comply with their own notice. Thanks to HB 4213, that issue is now clear.

Many landlords were caught in limbo as their court proceedings came to a crashing halt when eviction moratoriums went into effect. Many eviction actions that resulted in payment agreements were paused, with landlords not able to act on defaults of the same.

With the removal of Executive Order 20-13, a default for an amount not covered by the emergency period can now be acted upon with a declaration of non-compliance.

Courts differ in how quickly they are acting on such filings—and how quickly they are setting hearings, should a tenant request one. Unlike before, however, a path forward does exist.

Other court cases—in more advanced stages held in limbo by executive orders—are also now moving forward. For example, if a landlord had filed a declaration of non-compliance on a court payment agreement, or had a judgment of restitution in their favor, court proceedings or the ability to enforce these judgments were paused and pushed out.

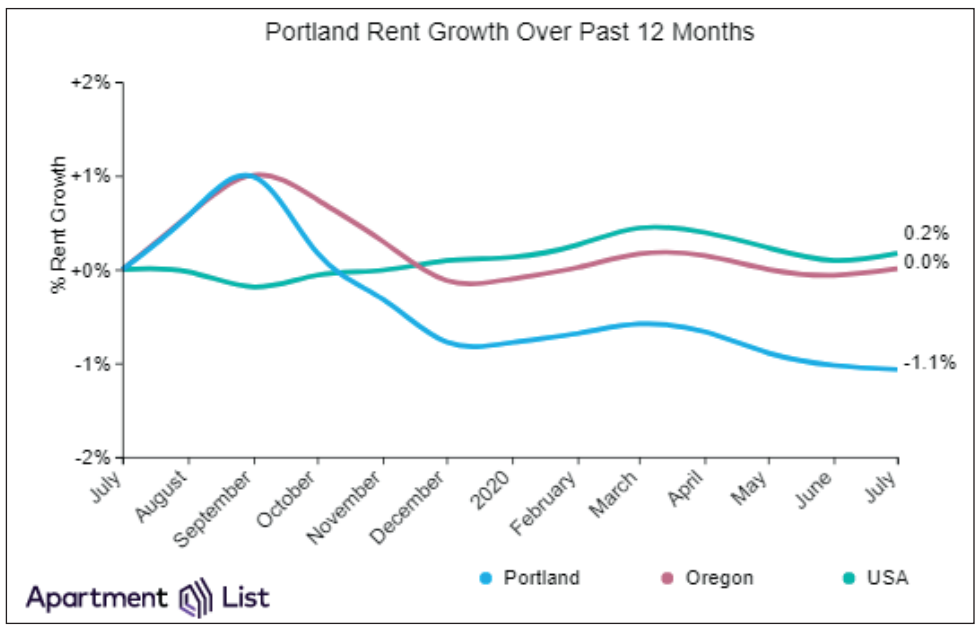
While technical, a path forward now likely exists for both. However, judgments can—and do—go stale. Keep in mind that ORS 105.159 prevents a clerk from issuing a writ on a judgment over 60 days old.

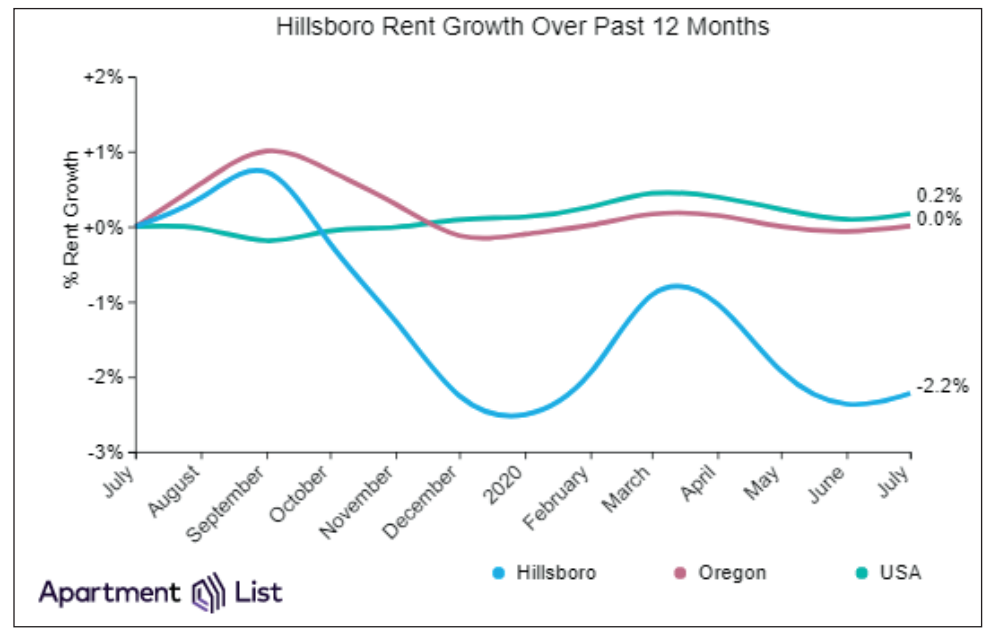
If you have such a case—with a judgment in hand—seeking counsel to file a motion to procure an amended judgment of restitution may be necessary to finalize your move toward possession.

From a legal perspective, HB 4213 opens doors that were otherwise previously closed. Many roadblocks still exist though, and HB 4213 adds yet another punitive damages provision of three months' rent.

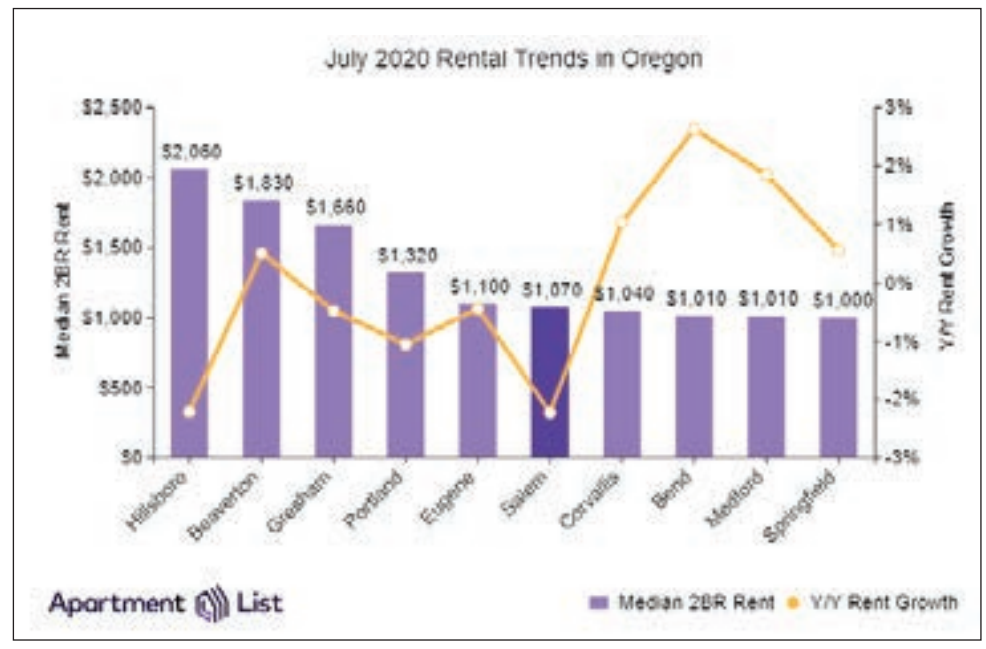
Procuring counsel to explore your rights and remedies is always important, but more so in today's difficult climate.

Bradley S. Kraus is an attorney at Warren Allen LLP. His primary practice area is landlord/tenant law, but he also assists clients with various litigation matters, probate matters, real estate disputes, and family law matters. A native of New Ulm, Minnesota, he continues to root for Minnesota sports teams in his free time. You can reach Mr. Kraus via email at kraus@warrenallen.com, or by phone at 503-255-8795.





City	Median 1BR Rent	Median 2BR Rent	M/M Rent Growth	Y/Y Rent Growth
Portland	$1,120	$1,320	0	-1.1%
Vancouver	$1,430	$1,680	0.3%	0.5%
Gresham	$1,400	$1,660	0.2%	-0.5%
Hillsboro	$1,740	$2,060	0.1%	-2.2%
Beaverton	$1,560	$1,830	0.3%	0.5%
Lake Oswego	$1,520	$1,800	0	0.9%
Tualatin	$1,600	$1,890	0.8%	-4%
Forest Grove	$1,230	$1,450	0.1%	2.2%
Wilsonville	$1,480	$1,740	0.7%	-1.5%
Canby	$1,480	$1,750	-0.1%	-4.7%
Gladstone	$1,520	$1,800	0.1%	1.5%
Fairview	$1,530	$1,810	-0.1%	-0.6%



Related Story on Page 1

New Administrative Rules Proposed to Fair Access in Renting Ordinance

By Ron Garcia

Opinion

"We're in the middle of one the greatest transformational periods of our lifetime. We get to write the future. And the city (of Portland) will be proudly at the center of that transformation." On July 30, Mayor Ted Wheeler made this opening remark addressing a news conference (held online due to COVID-19 restrictions of assembly). It was staged to address the controversial deployment of federal troops stationed in Portland to stop the nightly rioting in front of the federal courthouse.

I believe his statement is revealing as to the nature of our current city council's self-vision toward the leadership roles they have assumed as they navigate our city through uncharted areas of governance. Whether it's an effort to install more green bike boxes, or to "de-fund" the police force, or requiring landlords to pay large relocation fees to tenants in order to reclaim their property, the Portland City Council has been on a trek to re-engineer social norms for some time now.

And while most current news from city hall is focused on the frenzied chaos in the streets, there is still much happening behind its boarded-up doors and windows. On March 1, Portland adopted its Fair Access In Renting (FAIR) ordinance. This law landed on the community just as quarantine rules began to take effect and the pandemic absorbed our full attention. The FAIR ordinance became even further disregarded with the death of George Floyd and the escalation of protests and social unrest. Yet quiet, it is not dormant, and now this new law is actually growing!

The mayor's bold proclamation to stand up for Portland community values came just 24 hours after the Portland Housing Bureau (under his command) proposed new, additional administrative rules to its FAIR law. These additions and the resolve to carry this ordinance forward are sure to antagonize Portland rental-property owners and create deeper divisions between tenants and landlords. These protests may not be as loud, but are likely still to come (if not on the streets, maybe in the courthouses left standing).

As city leaders speak proudly of their dreams for our future, it is worth noting that FAIR has been roundly criticized by landlords and industry associations as over-reaching and onerous. Many argue that it does nothing to alleviate our well-publicized affordable-housing shortage and, in fact, may hinder any real efforts to address the issue. This is a law that when written had claimed to seek professional input, but upon implementation summarily dismissed all the recommendations that were offered. And however it is read, it is obviously intended to re-engineer long-held established industry standards of practice. It is an ordinance without precedence in any other city of America. Does that qualify it as an apt centerpiece of transformation? You be the judge.

What does FAIR do? It regulates two activities:

1. Rental-housing application and screening procedures, and
2. Rental-housing security-deposit accounting.

You may wonder if those topics are not already regulated; the answer is a resounding yes. Local, state and federal housing laws abound. So, you may ask, why must they be further regulated? Simply put, the authors believe that tenants are abused and routinely taken advantage of. They believe that the existing laws present insurmountable barriers to vulnerable segments of our society trying to find a home. They want to stamp out homelessness. Okay, that sounds "fair," right?

Imagine if there were a movement to cure hunger – but it required that all restaurants in a city were to book all parties at all requested times in their eateries, no matter what style food they serve and at what prices they charge. If the diner was late, they could not give the table to someone in line until they allowed three missed mealtimes over the course of the day (effectively holding the table for a no-show). Imagine further that if the diner didn't like the food or was allergic to the ingredients, the chef would be required to change the meal to fit their needs. Or if they couldn't afford the bill, the owner would be required to pay the tab on behalf of the customer.

Not only that, imagine that all restaurants would be required to post all of the rules and regulations and options for all of the diners on all of their advertising at all times to insure that all the people who came into contact with it were made aware of all of their rights, including the penalties they might seek for any misunderstanding or oversight (long waits, no water refills, dirty silverware, and so on) that may occur from any actions or statements of any of their staff at the establishment.

Enter FAIR. This is how it treats landlords. Are these rules made with good intentions? Maybe, but they're all a bit Draconian and confrontational. Do I exaggerate? What is really bad about the Fair Access In Rentals law in Portland, you ask? Google it. The first thing you will notice is how confusing it is, and how many conditions it addresses.

On March 1st one section (of many) read: "If a landlord simultaneously advertised the availability of more than one dwelling unit in the same property, the landlord can fulfill the requirements (of the ordinance) by publishing notices at least 72 hours prior to the open application period for rental of the available dwelling units through a combined notice that specifies… (and it then lists 7 specific conditions).

Today, the proposed rule adds more conditions: "If a landlord publishes

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Rule Changes Proposed

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multiple notices at different times or through different methods for the same availability and same dwelling unit, the open application period must be at least 72 hours after publishing the initial notice of dwelling-unit availability." Got it? Hmm. Me neither. The pamphlet the city publishes to explain how to screen a tenant is 24 pages long.

The rules for security deposits are even more challenging. They require specific depreciation schedules for damages that they define, and specific timelines when the value must be established with the tenant (prior to the "commencement date"), new provisions now proposed include: F. 3: " Within one week following the termination date, as defined in Subsection B.10 of the Rental Housing Security Deposit Administrative Rule, a landlord shall conduct a final inspection to document any damage beyond ordinary wear and tear not noted on the condition report." Sounds easy, right? Add to that the documentation process: "2. The landlord shall update the condition report to reflect all repairs and replacements impacting the dwelling unit during the term of the rental agreement that the landlord intends to apply against the tenant security deposit. The landlord shall provide to the tenant the updated condition report within 10 business days of repair or replacement…. "

The penalties for noncompliance are stiff. There are eight sections to this rule (A through H). In Section C, they establish the time frames from which the new accounting methods they demand must take effect. Section C – 4. states: "For rental agreements entered into prior to March 1, 2020, PCC 30.01.087 (FAIR ordinance) subsections C.2, C.4, C.5, E, F, G and H apply…" In other words, the law is essentially retroactive.

Does it sound a little scary? I repeat, Google it. The link I am working from here is this: https://www.portland.gov/phb/rental-services/news/2020/7/29/public-comment-proposed-permanent-administrative-rules-fair

As a property-management firm, at The Garcia Group, we are doing everything to digest, learn and implement the best practices to comply with the law. It's our business. I recommend any self-managing landlord to take a class as soon as possible to learn what they need to do to implement this law. It's either that or sign up to become (voluntarily or non-voluntarily) the test case in court. (It could be safer to volunteer for a drug trial.)

It's not a new epiphany on this particular mayor's part to push Portland's trajectory in the path of daring social reasoning. Remember (it was about 10 years ago) when the green bike lanes were first painted on our streets by the city? At that time, they were challenged by ODOT as non-compliant with Oregon traffic codes. Drivers were confused. Many bicyclists worried they'd be more vulnerable. Tourists had (and still have) no clue what they mean…. But to their credit, the green lanes and boxes have remained, and we car drivers have learned to navigate around and through them as best as we can and to respect their directions. Maybe FAIR will seem that transformational and tame in 10 years from now too. (Or not).

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What's a Landlord to Do?

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Alternatively, you can ask 20 different landlord attorneys and get 20 different answers."

Landlords need income for more reasons than just paying the mortgage

Petersen said in the case of landlords, "They've got to upkeep the facility. They've got to eat. So it's not a perfect situation, but certainly probably the biggest single expense landlords have is their mortgage. And they got some relief there because the foreclosure moratorium is big."

So with the rent moratorium and foreclosure moratorium, "if those two things were to get out of whack, then I think things will tend to go haywire. That's actually what we were worried about before June 30 when (the moratorium) was extended to September 30, because previously the moratorium was set to expire on July 1."

So, what is a landlord to do?

Petersen said while not perfect, he would offer a couple of suggestions.

"No. 1, when October 1 rolls around, assuming things don't change, the rent that's going to come due from October 1 onward is presently due. The deferred rent, or the pre-October 1 period, is not due until April 1, 2021, so landlords would be best positioned to make clear with their tenant that the money they start receiving on October 1 is applied to past-due rent if you can achieve that because then you'll be both collecting the past-due rent and you'll be collecting the current rent, assuming of course the tenant can pay.

"On the other hand, if it's just applicable to the current rent, then you still got this nut for the past-due rent that you're not going to collect until April.

"So it's advantageous for the landlord starting October 1 to apply payments first to the past-due rent. So if you can achieve that, that's good. The way the law is set up in Oregon is that the tenant has to specifically notify the landlord what the rent applies to, the payments apply to, so if they don't then the landlord would be free to apply it to past-due rent. So that's the first thing that I would suggest," Petersen said.

Miner also offered a couple of suggestions.

"If landlords have instances where they have tenants who they know can pay, but (those) people are taking advantage of this bill, the landlord should contact their legislator and give them specific examples of tenants who are taking advantage of the bill.

"To be fair, I haven't heard of a lot of tenants who are acting in bad faith. But I think we need to know about it if there are, because there's no means-testing to this bill. It just says: 'you don't have to pay rent.' It doesn't matter if you can pay, it doesn't matter if you've been negatively affected by COVID-19, or if you're just being a jerk. So that's No. 1. Legislators need to know if there are bad apples out there."

What else is a landlord to do?

"There's nothing in the bill that says you can't remind tenants of what they owe," Miner said. "It's okay to continue to send a monthly statement saying, 'Here's what you owe. Here are all of your utilities.' You can send those types of statements."

Other than that, "a landlord needs to wait until the end of September," when landlords can send notice in October.

If a landlord asks a tenant to provide information concerning how they plan to pay the rent or a rent payment plan, Miner said that "offering a payment plan and suggesting a payment plan is perfectly okay." However he said landlords should avoid making any types of threats, or doing anything that sounds like a threat, to the tenant. He said landlords should be very careful especially to stay away from any threats suggesting what may happen after September 30.

Miner says that approaching tenants in a collegial fashion – "We're assuming that you're not paying because you're being negatively affected by COVID, right? We understand these are hard times and trying times … is there some type of repayment plan that we can work out?" will get the best response.

Put the magic language in any agreement with tenants

"If a landlord does end up working out a repayment plan, it's of course important to get that in writing, get it signed by both parties," Miner said, adding that HB 4213 set aside some of the waiver arguments found in Oregon law.

"I think if you have a payment plan, you're still going to want to put the magic language in there that preserves a landlord's right to bring an action down the road once a landlord is able to bring an action."

Some attorneys may advise landlords that if they accept partial rent payments, such action could permanently change the amount of rent due in the lease. However, Miner said, "right now the bill suspends the waiver provisions of the statute, which is ORS 90.412." The current language should protect a landlord from waiver.

"However, tenants' lawyers are very creative in what they do. And so I think a tenant lawyer could potentially find a run-around of that exception. So I would follow the rules that are found in 90.412 to be safe.

"A landlord should work with their attorney or with their management company to make sure that they have the magic language in there. And the magic language essentially being: 'Hey, look, I'm accepting a partial payment. By accepting a partial payment I'm not waiving my right to send you a notice of termination in the future. And everybody agrees that I can, at some point in the future, actually terminate your tenancy if you don't pay the balance.' I think something along those lines. Most forms that management companies or attorneys use have that magic language included." Miner said.

Petersen pointed out another issue involving current leases.

"If landlords already have a lease amendment in place that they entered into with their tenants, pre-June 30, and that amendment is stricter for the tenant than the current rules of the current moratorium, chances are it's unknown whether or not that will be enforceable.

"The legislature tried to address that in the bill and said that basically any other private arrangement reached between landlords and tenants that was harsher for the tenant than this bill aren't enforceable. I think it remains to be determined whether that's legal – if they can interfere with a private contract in that fashion.

"So landlords who have lease amendments in place that attempted to deal with COVID-19 that were less generous to the tenant than the law, depending on the financial incentives, may have an incentive to try to enforce that nonetheless, but it remains to be seen whether or not that's going to happen."

Petersen added, "I suspect some landlord somewhere will test it, sooner or later, and then we'll know."

When asked about the ability to change private agreements, Miner added, "it is an important question of whether the Legislature is violating the Contract Clauses of the Oregon and U.S. Constitutions, especially when the Legislature is allowing individuals who may not be negatively affected by the emergency declarations. If a landlord ends up in a lawsuit alleging violations of the law, the landlord should talk with their lawyer about such an argument. Is the law Constitutional?"

Maintenance, habitability requirements and security deposits

Both attorneys agreed that landlords and property managers may want to put some maintenance or other improvements on hold unless it affects the landlord's habitability requirements under Oregon law.

"Defer all the maintenance you can defer," Petersen said. "You have very limited cash flow and you're going to have to do triage. Non-essential building maintenance is probably just going to have to wait. I think a tenant would have a hard time complaining that their building is not being maintained to the standards that they're used to given that they're not paying the rent.

"There is an implied warranty of habitability in all residential property in Oregon, so the landlord is still going to have to meet that minimum habitability standard," Petersen said.

As far as the maintenance side, "that's another problem

David Petersen

Bill Miner

with this bill," Miner said. "Landlords continue to have habitability requirements. They have to meet their duties for maintenance. But if you have improvements or something along those lines, (it's) probably best to put those things on hold until we get through this pandemic," Miner said.

Miner said landlords and property managers cannot use security deposits to help pay for maintenance or to help with mortgage payments.

Landlords and their mortgage payments

"Those security deposits are still security deposits that you are holding under the Landlord Tenant Act. If you are having a difficult time with making a mortgage payment, the best thing to do is to contact your mortgage provider and ask if you can get relief, especially if you've been economically harmed. Of course, the landlord as a borrower is probably going to have to actually show some economic harm." Miner said.

Petersen said his advice for landlords who are not getting rent payments from tenants is "to get out in front of it with your lenders. Lenders right now, in our experience, my experience and my firm and my creditors' rights group, is that lenders are also in a kind of a cooperative mood right now, and they're perfectly willing to work out payment plans, forbearance agreements.

"Everybody likes certainty, and lenders particularly like certainty. If they can get something on paper that will give them an understanding of how they might get partially paid or when they're going to get paid, in my experience most lenders are interested in that. So don't wait until October 1 when you're in default of your mortgage to call them. Get out in front of it and find out what they're doing for borrowers now because you may feel alone, but there's a gazillion similarly situated parties," Petersen said.

Miner said while many people are focused on and talking about the non-payment of rent, "If there were other violations going on, or other breaches of the rental agreement, make sure that you're enforcing those breaches."

Petersen said the courts are operating in Oregon on a limited basis.

"So at least in theory, you could even get into court today on a lease-enforcement action if your tenant was in default for something other than nonpayment of rent, by violation of a use clause or hazardous materials, or who knows? Anything that's not nonpayment of rent is still at least, in theory, something that could result in a termination of a lease and an eviction. Now, I highly doubt you're going to get the kind of rapid response that you normally get for forcible entry and detainer, or unlawful detainer as they call it in California, but you still should be able to do it," Petersen said.

The coming clash of political forces

Petersen compared some of the differences between commercial landlords and the residential side.

Petersen said on the residential side, there's going to be an interesting clash between tenants who just can't make up the past rent and the trend in Oregon to protect tenants.

"That's going to be really interesting to see how that plays out. On the commercial side, I guess there's a little less sympathy for the tenant that can't pay its rent. I think we probably are going to see come April next year – or even October – a rash of evictions, tenants just walking away or filing for bankruptcy. Those are probably the three most likely outcomes.

"I think in the residential market is where the rubber's

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Landlords Caught Between a Rock and a Hard Place

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really going to hit the road, because the legislature and the governor are going to be stuck between the financial reality for landlords who aren't getting paid rent, and kind of the political winds that blow in favor of tenants," Petersen said.

Miner said, "At this moment in time, the tenant lobby is very powerful. They have the ears of important legislators and have been effective in getting their message out. They have also been able to use actions a few bad apple landlords to push through sweeping laws that has a negative effect on the vast majority of landlords. For whatever reason, the legislature is afraid to go up against these tenant groups.

"I think it is really important for the landlords to get organized. Right now, they are not speaking with a cohesive voice. Landlords need to understand what their associations are doing and saying, because I do think that there have been some instances i where some pro-landlord organizations or individuals associated with those organizations are saying, 'Oh, these types of changes are just fine.' And so some of the pro-tenant legislators are saying, 'Oh, look, we have at least one landlord that's okay with this; therefore we're covered.'

"Again, it's important for landlords to know what's going on with their associations. Ask the questions like, 'What do you think of this? What are you doing to protect us?' Ultimately I think we're going to keep seeing the same types of proposals and disregard for the negative affects of landlords until we start fighting it at the Legislative level and in the Courts. How far can a Legislature go to challenge our existing contracts? How far can a Legislature go to lump all landlords in the same category? How are we expected to continue paying our obligations?'

"It's one thing to have an emergency, and to be able to interfere with people's contracts because of an emergency, but is the Legislature's response to the emergency too broad?" Miner said.

"If there are people out there who are taking advantage of this, if there are tenants out there who can pay but are choosing not to pay for whatever reason, then they're taking advantage of the situation. I would imagine that the governor and the legislature – that's not their intent either.

"So we need to really narrow future laws to make sure we have common sense solutions, and the best way to do that is to get the landlords to the table," Miner said.